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Adjudicative Procedure and the Model State Administrative Procedure Act (1981)

Committee on Procedural Standards of the National Association of Administrative Law Judges

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**ADJUDICATIVE PROCEDURE AND THE
MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1981)
REPORT OF COMMITTEE ON PROCEDURAL STANDARDS OF
THE NATIONAL ASSOCIATION OF ADMINISTRATIVE LAW JUDGES**

The Procedural Standards Committee of the National Association of Administrative Law Judges (NAALJ) has examined the new Model State Administrative Procedure Act (MSAPA) (1981) "for the purpose of preliminary evaluation of its provisions and their potential application to state adjudicative procedure." Its report, which reviews only Article IV of the Act, is reprinted below at the request of the Board of Governors. Members are invited to address their comments, in writing, to Association Secretary Stanley J. Cygan, who is principal author of the Report.

The first Model APA was adopted by the National Conference of Commissioners on Uniform State Laws in 1946 and a revised version of that Model was adopted in 1961. More than half of the states have adopted an administrative procedure act based, in part, on the 1946 or 1961 Models. The 1946 and 1961 Models were general in nature and it was believed by the Commissioners that a more substantial and comprehensive version was now due. This Committee shares this view as the only real means of achieving the desirable goal of more uniform rules of adjudicative procedure, for despite the present state APA's, little uniformity exists among agency adjudicative procedure in most states. This Model will undoubtedly serve as the model for state APA's, just as the previous models did.

The Model APA is 150 pages long, including comments. The Model was adopted by the National Conference of Commissioners on Uniform State Laws meeting in New Orleans, July 31 through August 7, 1981. Most of the language for the Model is based upon relatively recent state administrative procedure acts adopted in Florida, Iowa, Virginia, California, New Jersey, Massachusetts and others.

As stated in the "Prefatory Note" to the Model APA:

This Model Act...creates only procedural rights and imposes only procedural duties. It seeks to simplify government by assuring a uniform minimum procedure to which all agencies will be held in the conduct of their functions."

The Model APA does not deal with minor details and is flexible enough to allow in many areas agency variations to fit particular problems. The Committee was basically impressed by the Model's scholarship and completeness and did not wish to be overly technical with its criticisms, preferring to deal with the concepts rather than language, nomenclature or other minor details. It is noted that the document

only a model or suggestion and if it were used as a model to amend state law, fous specific revisions would certainly be necessary, depending on the circumstances of the state involved. As a consequence, only those sections to which Committee viewed some difficulty or criticism are discussed. Those sections which the Committee had no disagreement or criticisms are little mentioned, at all. References should be made to the new Model itself, including its explanatory comments, which can be obtained, at nominal cost, from the National Conference of Commissioners on Uniform State Laws, 645 North Michigan Avenue, Suite 510, Chicago, IL 60611.

* * *

Model adjudicative procedure is contained in Article IV of the new Model

A. Adjudicative proceedings are required by this article, with some exceptions, whenever the agency takes action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interests of a specific person or persons. The new Model establishes four types of adjudicative procedures for this purpose. The first is "formal adjudicative hearings, which is referred to as "contested cases" in prior models, and three new procedures called "conference," "summary" and "emergency" proceedings.

"Conference adjudicative hearings" are proceedings where no material issue of fact has appeared or, if a disputed fact has appeared, the amount or other stake involved is relatively minor as specified by statute.

"Summary adjudicative proceedings" are available if the adjudication does not involve a matter of public interest, the issue is minor, the use of the summary proceeding is not violating any provision of law, and the agency involved has specifically adopted the procedure for the allowed category.

"Emergency proceedings" are those involving an immediate danger to the public health, safety or welfare requiring immediate action. Subsequent to the emergency order, other adjudicative procedures, as described above, must proceed as quickly as feasible.

The Committee feels that the above four procedures are flexible enough to satisfy any adjudication requirement and provide efficient, economical and effective government administration, yet insure meaningful guarantees of fairness and due process to litigants.

This Association in the past has urged the use of "administrative law judges," as described in Section 4-301 of the Model, employed by a central panel organization, independent of the agency over which the administrative law judge adjudicates. The Model APA, as finally adopted, addresses these concerns. The modified language of the new Section 4-202 would require that matters be heard by an agency head, one or more members of the agency head, or an administrative law judge. If the agency head presides, the agency head issues the final order as provided by Section 4-214 of the draft. If any other officer presides, an initial order is issued, appealable to the agency head pursuant to Section 4-215. Optional (bracketed) language in Section 4-202 would permit the agency head to designate presiding officers. It is felt by this Committee that if this optional language is utilized at all, it should only be in very limited cases specified by law. Broad discretionary power, as contemplated by the optional language, should not be granted.

Section 4-301, related to the issue of the presiding officer, establishes an independent "Office of Administrative Hearings" employing administrative law judges. A number of states have such independent administrative law judge organizations, of varying natures, such as California, Colorado, Florida, Massachusetts, Minnesota, New Jersey, Tennessee and Washington. This Committee hopes that the suggested language requiring mandatory use of the "Office of Administrative Hearings" instead of the optional use, be utilized. Exceptions to the use of the "Office", if any, should be specialized entities devoted solely to hearings in highly technical and/or specialized areas and which do not engage in investigative or prosecutorial functions.

The Committee feels that mandatory use is the only real way to insure prohibitions concerning bias, separation of functions and ex parte communication are enforced. The Committee believes that if discretionary use language is adopted, the Office will rarely be used. The Office should certainly be mandated for those agencies which combine prosecutorial and adjudicative functions and which, as a consequence, review their own decisions. Section 4-301 also has optional (bracketed) language that no person may be employed as an administrative law judge unless that person is admitted to practice law in any jurisdiction of the United States. Because of the requirements of an administrative law judge to be trained in evidence, law, legal research and the adjudicative process, such language should be utilized. "Grandfather" clauses could be used to minimize state changeover problems and to protect competent, non-lawyer hearing examiners.

Section 4-202 deals with the disqualification of presiding officers and Section 4-213 provides a very strong statement against ex parte communication, but Section 4-214 provides an ambiguous statement concerning separation functions. Such a combination is allowed by the Model APA as long as the presiding officer has not personally carried out the function in the same proceeding. It is the opinion of this Committee that the combination of prosecutorial and adjudicatorial functions be strongly discouraged, if not prohibited.

Section 4-214 created some controversy within the drafting committee of the Commission on Uniform State Laws. Earlier drafts of the Model noted a minority position that Section 4-214(c) should read "may not" and thereby prohibit persons who made or participated in initial determinations from being presiding officers in subsequent stages of the same proceeding. This Committee believes that the use of the word "may" would allow the presiding officer to review his own decision and would seem to insure that there would be "ex parte" communications, not part of the record, that would influence the decision of the presiding officer. The difficulty with paragraph (c) may be that its meaning is unclear and ambiguous. This Committee feels that the problems with Section 4-214(c) would not exist if there was mandatory use of administrative law judges and the Office of Administrative Hearings of Section 4-301, because it is the independence and integrity of the hearing officer for which these latter reforms attempt to address.

Section 4-212 of the Model APA differs from the draft Models in a small, but substantial way. The sentence, "Evidence may not be excluded because it is hearsay," has been added to paragraph (a) of that section. Previous drafts did not have this language. Section 4-215(d) dealing with the requirements of final and initial orders, eliminates the "residuum" and "substantial evidence"

rules and replaces them with the "reasonable person" rule of evidence. Specifically, the new Model APA's Section 4-215(d) reads:

"...findings (of fact) must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a civil trial...."

This is a serious deviation from the previous Model State APA (1961).

Section 10(a) of the previous Model APA reads as follows:

- (a). Irrelevant, immaterial or unduly repetitious evidence shall be excluded. The rules of evidence as applied in (non-jury) civil cases in the (District Courts of this State) shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under these rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonable prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be received in written form.

The substantial evidence and residuum require that administrative findings of fact be based on substantial evidence and cannot be based solely upon evidence which would be legally inadmissible in a civil trial. Administrative findings of fact can, in part, be based upon such inadmissible evidence, if such evidence is corroborated by substantial evidence. McCormick on Evidence (Cleary, ed. 1972), p. 847.

This rule and the hearsay rules are considered protective of due process and fairness in administrative hearings, assuring that findings are supported by evidence which is subject to confrontation and cross-examination. These rules are considered basic and fundamental and not merely a technical rule of evidence. Despite the above, where there is sufficient competent evidence to support an administrative decision, the improper admission of hearsay testimony in administrative proceedings is not prejudicial error. McCormick, Supra., pp. 840-842; Russell v. License Appeal Com'n of City of Chicago, 133 Ill. App. 2d. 594, 273 N.E. 2d 650, 653 (1971).

It is further hornbook law, that evidence, although hearsay and incompetent, if received without objection, is to be considered as if it were in law admissible and given its natural probative effect. McCormick, Supra., p. 125. As a consequence, what the authors of the new Model APA seek is to use legally incompetent evidence to which someone has made objection as a basis for a finding of fact against the objector.

Despite the considerations and arguments of McCormick, Supra., and Kenneth Culp Davis, in his Administrative Law Treatise, Section 14.10 (1958), the Committee sees no substantial reason to modify present rules of administrative evidence stated in the prior APA, which are well known, fair, and designed to objectively test the probative reliability of evidence. The "reasonable person" test is vague, subjective and will tend to confuse litigants as to the standard of evidence necessary to sustain their position. It will further force the development of an administrative "common law" designed to test the reasonableness and reliability of evidence which may, in the future, be far more complex and confusing than the present rules of evidence.

The "reasonable person" test is so vague and subjective that it might be considered a double standard, considering that reasonable men differ in their definition of reasonableness and some people may inherently believe that evidence offered by one is more reasonable than evidence offered by another. For example, an agency employed hearing examiner, because of subtle or direct coercion, prejudice, or other factors, may be willing to accept agency hearsay as "reasonable" and more reliable than the direct evidence of a litigant, and protect the agency source from confrontation and inconvenience.

The present rules seek to force agencies and litigants to be responsible, fair and truthful while seeking the best evidence. The revised Model APA seems to view these goals as secondary to administrative expediency. The Committee recommends that the "substantial evidence" and "residuum" rules should be retained as protective of the public interest and as a means to compel litigants and administrative agencies to act responsibly in the adjudicative process.

Section 4-104 deals with time limits and notification requirements for agency action on application for all orders, other than declaratory orders. Time limits are imposed on any proceeding where other time limits have not been specified by state statute. The Committee believes that while, in general, mandatory time limits for the taking of administrative adjudicative action are desirable, the Model APA language should provide for regulatory variations and not require only statutory modification. The myriad of administrative proceedings should not unnecessarily be forced to a single time limit standard. Section 4-104 is also vague concerning the remedy for violation of the suggested limit. The result of a failure to comply should be specified as well as the remedy available to the aggrieved party.

Section 4-203 deals with representation of parties before administrative agencies. The language of this section was designed to be generally applicable to all states. However, the Committee takes notice of the many states that strictly construe the practice of law and/or regulate it through the judicial branch of state government and warns that the language of 4-203 is not applicable

to many states. In those states where it is the sole prerogative of the judicial branch to regulate the practice of law, any statutory modification of the practice would be void. As a consequence, Section 4-203 would have to be redrafted to be consistent with that state's law.

Section 4-210 imposes civil procedure rules of discovery as used in the courts. While the Committee believes that some form of uniform discovery procedure is desirable, generally state rules of civil practice are far too broad for application in all agency procedures. The standards for discovery should be redrafted for specific applicability to state administrative practice.

CONCLUSIONS

The Committee was generally impressed with the new Model APA's thoughtful and thorough considerations of all problems facing Administrative Agencies. The Committee recommends that present state administrative procedure acts be reviewed and revised, using the new Model APA as a touchstone, cognizant of the Committee's recommendations and that all local state associations of administrative law judges assist local bar associations and other appropriate private and governmental organizations in their review of the new Model Administrative Procedure Act.

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