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## The Model State Administrative Procedure Act in the USA

### I. Brief History of the MSAPA

For the European jurisprudence the American legal system and even the public administration (procedure) model is a mixture of the Continental and the Anglo-Saxon tendencies. The role of the statutory law is significant (*Administrative Procedure Act*) but the administrative procedure is interpreted and applied in an English way: e.g. the principle of the Due Process of Law, contradictory proceeding and the primary of judicial review.

The first version of the *Model State Administrative Procedure Act* (here in after referred to as 1946 Act) was promulgated and published in 1946 by the Uniform Law Commission (ULC),<sup>1</sup> in which year the Federal Administrative Procedure Act was drafted.<sup>2</sup> It is incorporated basic principles with only enough elaboration of detail to support essential features, therefore it is a “model”, and not a “uniform”, act. A model act is needed because state administrative law in the 50 states is not uniform, and there are a variety of approaches used in the various states.<sup>3</sup> The difficulty derives from the federal structure of the USA, because details of administrative procedure “must vary from state to state” as a result of different histories in general, of legislative enactment and state constitutions. By about 1960, twelve states had adopted the 1946 Act.<sup>4</sup> This problem occurred in other federations either e.g. in the European Union, and the best solution was the introduction of directives.

At the end of 1950s it was obvious that the 1946 Act needs to be revised. The major principles of the *1961 Administrative Procedure Act* (here in after referred to as 1961 Act) were: i) requiring agency rulemaking for procedural rules; ii) rulemaking procedure that provided for notice, public input and publication; iii) judicial review of rules; guarantees of fundamental fairness in adjudications; iv) and provision for judicial review of agency adjudication.<sup>5</sup> It was a short act, contained only 19 sections. Over one half of the states adopted the 1961 Act or large parts of it.<sup>6</sup>

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<sup>1</sup> also known as National Conference of Commissioners on Uniform State Laws (NCCUSL)

<sup>2</sup> <http://www.uniformlaws.org/>

<sup>3</sup> cf. *Administrative Procedure Act*, Report of the House Judiciary Committee, No. 1989, 79<sup>th</sup> Congress, 1946.

<sup>4</sup> Those states were: North Dakota, Wisconsin, North Carolina, Ohio, Virginia, California, Illinois, Pennsylvania, Missouri, Indiana.

<sup>5</sup> in BLOOMENTHAL, Harold S.: *The Revised Model State Administrative Procedure Act: Reform or Retrogression?* in *Duke Law Journal* Vol. 1963, No. 4 (Autumn, 1963), pp. 593-628

<sup>6</sup> 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.

The development and the elaboration of the *1981 Model State Administrative Procedure Act* (here in after referred to as 1981 Act) began in the 1970s under the Uniform Law Commission. The 1981 Act was entirely new, with more detail than the earlier versions, and consisted of 94 sections.<sup>7</sup> Several other states have drawn some of their administrative procedure provisions from the 1981 Act.<sup>8</sup>

The present version is the *2010 Model State Administrative Procedure Act* (here in after referred to as 2010 Act or MSAPA) which maintains the continuity with earlier ones. The 2010 Act is lengthier than the 1961 Act, but shorter and less detailed than the 1981 Act. The 2010 Act contains slightly more than 60 sections divided into eight articles, 75% of the length of the 1981 Act, but covers more topics. The reason of the revision is that, in the past two decades state legislatures, dissatisfied with agency rulemaking and adjudication, have enacted statutes that modify administrative adjudication and rulemaking procedure. In a “harmonisation tendency” some sections of the 2010 Act are similar to the Federal Administrative Procedure Act. The drafting committee had three goals governing the drafting process i) fairness, ii) efficiency (mostly by providing for extensive use of electronic technology by state governments), and iii) ensuring public access to agency information.<sup>9</sup> The 2010 Act creates only procedural rights and imposes only procedural duties, and throughout the text there are provisions that refer generally to other state laws governing related topics.<sup>10</sup> There is a useful homepage where each state’s act can be found with the brief summary.<sup>11</sup>

## II. Major Provisions of the MSAPA

The new revised model of the State Administrative Procedure Act (2010) is divided into eight articles. The numbering of the sections is different from the European practice, each article begins a new hundred, e.g. the first article’s first section is 101, the second article’s first section is 201 etc. Therefore the APA consists of 803 sections by numbering, but in fact there are only 66 articles. As a model act it entitles the states to configure the text to their demands where the APA uses bracketed language e.g. the official name of the [act], the [Legislature] and the [administrative bulletin] in the state, or the deadlines, values, amounts etc. In other cases the state legislatures are allowed to select one of several alternatives e.g. in Section 201(b) and 413 (f), four options are bracketed for the type of format, electronic or written, in which the [publisher] can publish rulemaking documents.

### II.1. General provisions

Article 1 is intended to provide extensive definitions of key terms used in the act. Each state is obliged to determine the short title of the APA. Then follow the definitions (Sec. 102).

The adjudication and proceeding are distinguished but in a strong connection. The *adjudication* means the process for determining facts or applying law pursuant to which an agency formulates and issues an order. The *proceeding* means any type of formal or informal

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<sup>7</sup> Read more in HARVES, Duane R.: *The 1981 Model State Administrative Procedure Act: The Impact on Central Panel States*. in *Western New England Law Review* (1983-1984)

<sup>8</sup> Some of those states are: Florida, Iowa, Kansas, California, Mississippi and Montana. Since promulgation of the 1981 Act, Arizona, New Hampshire, and Washington have adopted many of its provisions.

<sup>9</sup> in *Revised Model State Administrative Procedure Act*. National Conference Of Commissioners On Uniform State Laws 2010. pp. 3.

<sup>10</sup> LUBBERS, Jeffrey S. –ed.: *Developments in Administrative Law and Regulatory Practice*. American Bar Association, 2010. pp. 135.

<sup>11</sup> <http://administrativelaw.uslegal.com/administrative-procedure-acts/>

agency process or procedure commenced or conducted by an agency, and it includes adjudication, rulemaking, and investigation. The *agency* is broadly interpreted: state board, authority, commission, institution, department, division, office, officer, or other state entity that is authorized by law of this state to make rules or to adjudicate, but – according to the separation of the powers – the term does not include the Governor, the [Legislature], or the Judiciary. The definition of the *person* is also wide, which means an individual, corporation, business trust, statutory trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity. The case is a *contested case*, which means an adjudication in which an opportunity for an evidentiary hearing is required by the federal constitution, a federal statute, or the constitution or a statute of this state. There is no distinction between decisions to the merits and to not the merits of the case, the *order* means an agency decision that determines or declares the rights, duties, privileges, immunities, or other interests of a specific person. (In the European practice there are resolution to the merits, and ruling for other issues).

According to the applicability of the APA (Sec. 103), the [act] applies i) to an agency unless the agency is expressly exempted by a statute of this state, and ii) to all agency proceedings and all proceedings for judicial review or civil enforcement of agency action commenced after [the effective date of this [act]].

## II.2. Public access

Article 2 contains provisions on easy *public access* to agency law and policy that are relevant to agency process. The [publisher]<sup>12</sup> shall i) administer the [act] that require publication, ii) create and maintain an Internet website on which make available the [administrative bulletin], the [administrative code], filed with the [publisher] by an agency. The [administrative bulletin] shall be published at least once [each month]. The [publisher] shall make available on the [publisher's] Internet website,<sup>13</sup> at no charge, all the documents provided by an agency, and in written form on request, for which the [publisher] may charge a reasonable fee (Sec. 201).<sup>14</sup> It is interesting that this section does not address the issue related to what languages rules should be published in, nor does it address issues related to translation of information contained in these documents into languages other than English.<sup>15</sup>

A person may petition an agency for a *declaratory order* that interprets or applies a statute administered by the agency or states whether or in what manner a rule, guidance document, or order issued by the agency applies to the petitioner (Sec. 204). Not later than 60 days [or at the next regularly scheduled meeting of the agency, whichever is later,] after receipt of a petition, an agency shall issue a declaratory order in response to the petition, decline to issue the order, or schedule the matter for further consideration. In accordance with the dissimilarity the [Governor] [Attorney General] [designated state agency] shall adopt *standard procedural rules* for use by agencies, which must provide for the procedural functions and duties of as many agencies as is practicable (Sec. 205).

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<sup>12</sup> In the MSAPA the term [publisher] is to describe the official or agency to which substantive publishing functions are assigned.

<sup>13</sup> Sec. 102 (17) "Internet website" means a website on the Internet or other appropriate technology or successor technology that permits the public to search a database that archives materials required to be published by the [publisher] under this [act].

<sup>14</sup> This section also recognizes that many agencies use electronic recording and maintenance of dockets and records, and it has become the standard practice for state agencies.

<sup>15</sup> in *Revised Model State Administrative Procedure Act*. National Conference Of Commissioners On Uniform State Laws 2010. pp. 21.

### II.3. Rulemaking

Article 3 deals with the rulemaking procedures and necessary documents.

Important provisions are *rulemaking docket* for all pending rulemaking proceedings that is indexed, and *rulemaking record* for each proposed rule which provides for the rulemaking documents to be maintained by the agency and facilitates judicial review (Sec. 301 and 302).<sup>16</sup> A rulemaking record contains: a copy i) of all publications in the [administrative bulletin] relating to the rule and the proceeding; ii) of any part of the rulemaking docket; iii) of all factual material, studies, and reports agency personnel relied on or consulted in formulating the proposed or final rule.<sup>17</sup>

A *formal rulemaking* procedure is defined by the 2010 Act. Any person may *petition* an agency to adopt a rule. An agency shall prescribe by rule the form of the petition and the procedure for its submission, consideration, and disposition. Not later than [60] days after submission of a petition, the agency shall: i) deny the petition in a record and state its reasons for the denial; or ii) initiate rulemaking (Sec. 318). According to the *time limit* provision, not later than [two years] after a notice of proposed rulemaking is published, the agency shall adopt the rule or terminate the rulemaking by publication of a notice of termination in the [administrative bulletin] (Sec. 307). To ensure the *public participation*, the agency proposing a rule shall specify a public comment period of at least [30] days after publication of notice of the proposed rulemaking during which a person may submit information and comment on the proposed rule (Sec. 306). An agency may not adopt a rule until the public comment period has ended. Since Gulick has emphasized in the POSDCoRB acronym the role of the Budgeting,<sup>18</sup> the American legislation takes into account the financial impacts, effects.<sup>19</sup> The 2010 Act orders, that an agency shall prepare a *regulatory analysis* for a proposed rule that has an estimated economic impact of more than \$[...].<sup>20</sup> The analysis must be completed before notice of the proposed rulemaking is published (Sec. 305). When an agency adopts a *final rule*, the agency shall issue a *concise explanatory statement* that contains: i) the agency's reasons for adoption, ii) the reasons for any change between the proposed and the final text,<sup>21</sup> and iii) the summary of any regulatory analysis (Sec. 313). The agency shall file in written and electronic form with the [publisher] each *final rule*. The [publisher] shall maintain a permanent register of all filed rules and *concise explanatory statements* for the rules (Sec. 316). The rule becomes *effective* [30] days after publication of the rule [in the administrative bulletin] [on the [publisher's] Internet website], except as otherwise provided in the Section 317, [unless disapproved by the [rules review committee]].

The agencies may differ from this regulation and proceeding in the case of emergency. If an agency finds that an imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program requires the immediate adoption of an *emergency rule* and publishes in a record its reasons for that finding, the agency, without prior notice or

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<sup>16</sup> cf. ASIMOW - LEVIN: *State and federal administrative law*. West, 2009. pp. 352.

<sup>17</sup> See ASIMOW, Michael: *Interim Final Rules: Making Haste Slowly*. in *Administrative Law Review*, 1999. pp. 703, 712-15. and LEVIN, Ronald M.: *Direct Final Rulemaking*. in *George Washington Law Review*, 1995.

<sup>18</sup> in GULICK & URWICK: *Notes on the Theory of Organization*. in *Papers on the Science of Administration* New York: Institute of Public Administration, 1936. pp. 3-35.

<sup>19</sup> See WISNANT & CHERRY: *Economic Analysis of Rules: Devolution, Evolution, and Realism*. in *Wake Forest Law Review*, 1996. pp. 693, 694.

<sup>20</sup> See HAHN, Robert W.: *State and Federal Regulatory Reform: A Comparative Analysis*. in *Journal of Legal Studies*, 2000. pp. 873, 875-78.

<sup>21</sup> In the USA it has a wide precedent practice: *Long Island Care at Home Ltd. v. Coke* 551 U.S. 158 (2007); *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); *Amer. Bankers Life Ins. Co. v. Div. of Consumer Counsel*, 220 Va. 773, 263 S.E.2d 867 (1980) etc.

hearing or on any abbreviated notice and hearing that it finds practicable, may adopt an emergency rule. The emergency rule may be effective for not longer than [180] days [renewable once for no more than [180] days] (Sec. 309).

The Section 311 authorizes an agency to issue a *guidance document* without following the rulemaking procedural requirements,<sup>22</sup> which may contain binding instructions to agency staff members if, at an appropriate stage in the administrative process, the agency's procedures provide an affected person an adequate opportunity to contest the legality or wisdom of a position taken in the document.<sup>23</sup>

## II.4. Adjudication

Article 4 contains provisions governing the *adjudication* completed by an agency in a *contested case*. The procedures are designed to be used by both central panel agencies and enforcement agencies that conduct their own contested case hearings.<sup>24</sup>

The adjudication is completed by a an assigned administrative law judge, so called *presiding officer*, who is the agency head, a member of a multi-member body of individuals that is the agency head, or, unless prohibited by law of this state other than this [act], an individual designated by the agency head. According to the exclusion provision, an individual who has served as investigator, prosecutor, or advocate at any stage in a contested case or who is subject to the authority, direction, or discretion of an individual who has served as investigator, prosecutor, or advocate at any stage in a contested case may not serve as the presiding officer in the same case.

A *formal contested case procedure* is detailed by this Article. At the beginning the agency shall give *notice* of the agency decision to a person when the agency takes an action as to which the person has a right to a contested case hearing. The notice must be in writing, set forth the agency action, inform the person of the right, procedure, and time limit to file a contested-case petition, and provide a copy of the agency procedures governing the contested case.<sup>25</sup> In a contested case initiated by a person other than an agency, not later than [five] days after filing, the agency shall give notice to all parties that the case has been commenced (Sec. 405). When a hearing or a prehearing conference is scheduled, the agency shall give parties notice that contains the required information at least [30] days before the hearing or prehearing conference. The presiding officer shall give all parties a timely opportunity to file pleadings, motions, and objections.

All relevant *evidence in contested case* is admissible, including hearsay evidence, if it is of a type commonly relied on by a reasonably prudent individual in the conduct of the affairs of the individual (Sec. 404). Differently from the practice of most European countries testimony must be made under oath or affirmation. Evidence must be made part of the hearing record of the case. According to the provisions on *discovery*, a party, on written notice to another party at least [30] days before an evidentiary hearing, may: i) obtain the names and addresses of witnesses the other party will present at the hearing to the extent known to the

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<sup>22</sup> Four states have adopted detailed provisions regulating guidance documents in their administrative procedure acts. See Ariz. Rev. Stat. Ann. §§ 41-1001, 41-1091; Mich. Comp. Laws §§ 24.203, 24.224; Va. Code Ann. § 2.2-4008; Wash. Rev. Code Ann. § 34.05.230.

<sup>23</sup> See STRAUSS, Peter L.: *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*. in *Administrative Law Review*, 2001. pp. 803. See also ASIMOW, Michael: *Guidance Documents in the States: Toward a Safe Harbor*. in *Administrative Law Review*, 2002. pp. 631.

<sup>24</sup> in *Revised Model State Administrative Procedure Act*. National Conference Of Commissioners On Uniform State Laws 2010. pp. 5.

<sup>25</sup> cf. LUBBERS, Jeffrey S. –ed.: *Developments in Administrative Law and Regulatory Practice*. American Bar Association, 2010. pp. 9.

other party; ii) inspect and copy any of the following material in the possession, custody, or control of the other party (Sec. 411).

The presiding officer shall grant a timely petition for *intervention* in a contested case, with notice to all parties, if the petitioner i) has a statutory right under law of this state other than this [act] to initiate or to intervene in the case; or ii) has an interest that may be adversely affected by the outcome of the case and that interest is not adequately represented by existing parties (Sec. 409). On a request in a record by a party in a contested case, the presiding officer or any other officer to whom the power to issue a *subpoena* is delegated pursuant to law, on a showing of general relevance and reasonable scope of the evidence sought for use at the hearing, shall issue a subpoena for the attendance of a witness and the production of books, records, and other evidence (Sec. 410). Witness fees shall be paid by the party requesting a subpoena in the manner provided by law for witness fees in a civil action.<sup>26</sup>

To ensure the parties equal rights in the procedure and the separation of functions, while a contested case is pending, the presiding officer and the final decision maker may not make to or receive from any person any communication concerning the case without notice and opportunity for all parties to participate in the communication (*ex parte communication*). The presiding officer or final decision maker may communicate about a pending contested case with any person if the communication is required for the disposition of *ex parte* matters authorized by statute or concerns an uncontested procedural issue.<sup>27</sup> If a communication prohibited by this section is made, the presiding officer or final decision maker shall notify all parties of the prohibited communication and permit parties to respond in a record not later than 15 days after the notice is given.

If it is necessary – when an opportunity for a hearing is required by a federal or a state constitutional or statutory law provision – a *hearing* must be held. The hearing in a contested case must be *open to the public* and can be conducted via telephone, television, video conference, or other electronic means. The presiding officer may *close* a hearing to the public on a ground on which a court of this state may close a judicial proceeding to the public or pursuant to law of this state other than this [act]. The decision in a contested case must be based on the *hearing record* and contain a statement of the factual and legal bases of the decision. The agency shall maintain the hearing record in each contested case, which must contain: i) a recording of each proceeding; ii) notice of each proceeding; iii) any prehearing order; iv) any motion, pleading, brief, petition, request, and intermediate ruling; v) evidence admitted.<sup>28</sup> Unless otherwise provided by law of this state other than this [act], if a party without good cause fails to attend or participate in a prehearing conference or hearing in a contested case, the presiding officer may issue a *default order* (Sec. 412). If a default order is issued, the presiding officer may conduct any further proceedings necessary to complete the adjudication without the defaulting party and shall determine all issues in the adjudication, including those affecting the defaulting party.

The Section 413 determines *different types of orders*:

- if the presiding officer is the agency head, the presiding officer shall issue a *final order*. A final order is effective [30] days after all parties are notified of the order unless reconsideration or stay is granted by the 2010 Act. A party, not later than [seven] days after the parties are notified of the order, may request the agency to *stay* a final order pending judicial review. The agency may grant the request for a stay pending judicial review if the agency finds that justice requires (Sec. 417). The

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<sup>26</sup> Based upon California Government Code Section 11450.40. cf. LUBBERS, Jeffrey S. –ed.: *Developments in Administrative Law and Regulatory Practice*. American Bar Association, 2010. pp. 10.

<sup>27</sup> cf. ASIMOW - LEVIN: *State and federal administrative law*. West, 2009. pp. 121.

<sup>28</sup> cf. ASIMOW - LEVIN: *State and federal administrative law*. West, 2009. pp. 78.

agency shall create an index of all final orders in contested cases and make the index and all final orders available for public inspection and copying, at cost, in its principal offices (Sec. 418).

- if the presiding officer is not the agency head and has not been delegated final decisional authority, the presiding officer shall issue a *recommended order*.
- if the presiding officer is not the agency head and has been delegated final decisional authority, the presiding officer shall issue an *initial order* that becomes a final order [30] days after issuance, unless reviewed by the agency head on its own initiative or on petition of a party.

The 2010 Act provides on *remedies* either. The agency head may *review an initial order* on its own initiative (Sec. 414). A party may petition an agency head to review an initial order. On petition by a party, the agency head may review an initial order. A petition for review of an initial order must be filed with the agency head or with any person designated for this purpose by agency rule not later than [15] days after notice to the parties of the order. If the agency head decides to review an initial order on its own initiative, the agency head shall give notice in a record to the parties that it intends to review the order. If the agency head reviews an initial order, the agency head shall issue a final order disposing of the proceeding not later than 120 days after the decision to review the initial order or remand the matter for further proceedings with instructions to the presiding officer who issued the initial order. The agency head shall *review a recommended order* (Sec. 415). When reviewing a recommended order, the agency head shall exercise the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the order, except to the extent that the issues subject to review are limited by law of this state other than this [act] or by order of the agency head on notice to the parties. The agency head may render a *final order* disposing of the proceeding or remand the matter for further proceedings with instructions to the presiding officer who rendered the recommended order. A party, not later than [15] days after notice to the parties that a final order has been issued, may file a petition for *reconsideration* that states the specific grounds on which relief (lightening) is requested (Sec. 416).

The MASAPA grants facilitation for licenses. If a licensee has made timely and sufficient application for the renewal of a *license* or a new license for any activity of a continuing nature, the existing license does not expire until the agency takes final action on the application 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 order or a later date fixed by the reviewing court (Sec. 418).

The agency may take action and issue an order only to deal with an imminent peril to the public health, safety, or welfare (*emergency adjudication*). An emergency order i) must briefly explain the factual and legal reasons for using emergency adjudication procedures, and ii) may be effective for not longer than [180] days. (Sec. 407).

## II.5. Judicial review

Article 5 applies to *judicial review* of final agency action. The Act does not address civil or appellate procedure issues, the court chosen for judicial review of administrative law rules or orders, or the vehicle for review such as whether an appeal or a writ of mandate is filed to invoke judicial review of administrative agency action.<sup>29</sup> Those issues are governed by state law other than this act.

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<sup>29</sup> in *Revised Model State Administrative Procedure Act*. National Conference Of Commissioners On Uniform State Laws 2010, pp. 6.

First the *final agency action* need to be cleared which means an act of an agency which imposes an obligation, grants or denies a right, confers a benefit, or determines a legal relationship as a result of an administrative proceeding.<sup>30</sup> A person that meets the requirements of this [article] is entitled to *judicial review* of a final agency action (Sec. 501). The judicial review of a final agency action may be taken only as provided by rules of [appellate] [civil] procedure [of this state]. The court may grant any type of *legal and equitable remedies* that are appropriate.

The 2010 Act outlines in Section 503 time and other limitations, and distinguishes between the subjects of review. Judicial review of a *rule* on the ground of *noncompliance* with the procedural requirements of this [act] must be commenced not later than [two] years after the effective date of the rule. Judicial review of a *rule or guidance document* on other grounds may be sought *at any time*. Judicial review of an *order or other final agency action* other than a rule or guidance document must be commenced not later than [30] days after the date the parties are notified of the order or other agency action. The party may not petition for judicial review while seeking *reconsideration* defined in Section 416.

A person may file a petition for judicial review under this [act] *only after exhausting all administrative remedies available* within the agency the action of which is being challenged and within any other agency authorized to exercise administrative review (Sec. 506). Filing a petition for reconsideration or a stay of proceedings is not a prerequisite for seeking judicial review. The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent the administrative remedies are inadequate or the requirement would result in irreparable harm. The petition for judicial review does *not automatically stay* an agency decision. A challenging party may request the reviewing court for a stay on the same basis as stays are granted under the rules of [appellate] [civil] procedure [of this state], and the reviewing court may grant a stay regardless of whether the challenging party first sought a stay from the agency (Sec. 504).

According to Section 508 (*scope of review*),<sup>31</sup> in *judicial review of an agency action*, the following rules apply:

- the burden of demonstrating the invalidity of agency action is on the party asserting invalidity;
- the court shall make a ruling on each material issue on which the court's decision is based;
- the court may grant *relief* only if it determines that a person seeking judicial review has been prejudiced by one or more of the following: i) the agency erroneously interpreted the law; ii) the agency committed an error of procedure; iii) the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; iv) an agency determination of fact in a contested case is not supported by substantial evidence in the record as a whole; or v) to the extent that the facts are subject to a trial de novo by the reviewing court, the action was unwarranted by the facts.

## II.6. Office Of Administrative Hearings

Article 6 is intended to provide provisions governing central panel hearing agencies, typically named the office of administrative hearings. This provides for a neutral separation of the

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<sup>30</sup> This definition is based on state and federal cases. See *State Bd. Of Tax Comm'rs v. Ispat Inland*, 784 N.E.2D 477 (Ind., 2003); *District Intown Properties v. D.C. Dept. Consumer and Regulatory Affairs*, 680 A.2d 1373 (Ct. Apps. D.C. 1996); *Texas Utilities Co. v. Public Citizen, Inc*, 897 S.W.2d 443 (Tex. App. 1995) etc.

<sup>31</sup> in LEVIN, Ronald M.: *Scope of Review Legislation*. in *Wake Forest Law Review*, 1996. pp. 647.



hearing and decision authority from the agency authority to enforce the law and adopt agency rules. Central panel agencies have independence from other executive branch agencies which can provide for greater fairness in contested case hearings.<sup>32</sup>

The *Office of Administrative Hearings* is a quasi-judicial tribunal that hears administrative disputes. The [Office of Administrative Hearings] is created in the executive branch of state government [within the [ ] agency] (Sec. 601).<sup>33</sup>

The office is headed by a *chief administrative law judge* who i) appointed by [the Governor] [with the advice and consent of the Senate]; ii) serves a term of [five] years and until a successor is appointed and qualifies for office, be reappointed; iii) must have been admitted to the practice of law in the state for at least five years and have substantial experience in administrative law; iv) must take the oath of office required by law before beginning the duties. The chief administrative law judge has the *powers and duties* specified e.g. i) supervises and manages the office; ii) assigns administrative law judges; iii) monitors the quality of adjudications conducted by the judges; iv) may accept grants and gifts for the benefit of the office; and v) may contract with other public agencies for services provided by the office (Sec. 604).

The chief administrative law judge shall appoint *administrative law judges* pursuant to the [state merit system] (Sec. 603). In addition to meeting other requirements of the [state merit system], to be eligible for appointment as an administrative law judge, an individual must have been admitted to the practice of law in this state for at least [three] years.<sup>34</sup> An administrative law judge shall take the oath of office required by law before beginning duties as an administrative law judge. According to Section 606 in a contested case, unless the hearing is conducted by a presiding officer assigned under Section 402(a) other than an administrative law judge, an *administrative law judge must be assigned to be the presiding officer*. If the administrative law judge

- is delegated final decisional authority, he *shall issue a final order*,
- is not delegated final decisional authority, he *shall issue* to the agency head a *recommended order* in the contested case.

Section 607 provides: [This [article] does not apply to the following agencies: [list agencies exempted]].

## II.7. Rules review

The provisions of Article 7 are related to legislative review of agency rules, because it has become widespread in the states e.g. some constitutions require that the legislature pass a bill that is presented to the governor for approval. There is created a standing committee of the [Legislature] designated the [*rules review committee*] (Sec. 701). An agency shall file a copy of an adopted rule with the [rules review committee] at the same time it is filed with the [publisher]. An agency is not required to file an emergency rule adopted under Section 309 with the [rules review committee] (Sec. 702). Not later than [30] days after receiving a copy of an adopted rule from an agency, the [rules review committee] may: i) approve (confirm) the adopted rule; ii) disapprove the rule and propose an amendment to the adopted rule; or iii) disapprove the adopted rule (Sec. 703).

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<sup>32</sup> in *Revised Model State Administrative Procedure Act*. National Conference Of Commissioners On Uniform State Laws 2010. pp. 6.

<sup>33</sup> cf. the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997).

<sup>34</sup> cf. WILSON, Steven Harmon –ed.: The U.S. Justice System: An Encyclopedia. ABC-CLIO. 2012. pp. 214.

## II.8. Miscellaneous provisions

Article 8 contains only technical, miscellaneous provisions. This [act] modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act (Sec. 801). The Electronic Signatures Act allows state law to modify, limit or supersede its effect by laws consistent with it that are technologically neutral and that refer specifically to the Electronic Signatures Act. According to the closing provisions the earlier [State Administrative Procedure Act] is need to be repealed (Sec. 802), and the new one must define its effective date (Sec. 803).