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PROPOSED ADMINISTRATIVE PROCEDURE ACT

PREPARED BY

ADMINISTRATIVE LAW SECTION

OF

THE MAINE BAR ASSOCIATION

and

DEPARTMENT OF THE ATTORNEY GENERAL

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SUBCHAPTER I

GENERAL PROVISIONS

§2301 Short title.

This chapter shall be known and may be cited as the "Maine Administrative Procedure Act."

§2302 Definitions.

For the purposes of this chapter:

1. Adjudicatory proceeding. "Adjudicatory proceeding" means any proceeding before an agency or the Administrative Court in which the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing before an agency.

Comment

With the exception of the references to the Administrative Court, this definition follows closely the pattern of the Massachusetts APA (30A M.G.L.A. §1[1]), the APA proposed by the New York Law Revision Commission (§102[3], 1969) and the Revised Model State APA (§1[2], 1970).

The inclusion of the Administrative Court clause is made necessary by section 2602 in subchapter IV. The minimum standards for adjudicatory proceedings should not be different depending upon who conducts the hearing.

By way of this definition, the Act does not in and of itself create any rights to a hearing. The right exists independently of this Act and arises from statutory or Constitutional command. The only such statutory command in this Act if §2703 in subchapter V on licensing. Subchapter III, which is keyed by this definition, provides uniform procedures for any hearings so commanded.

2. Agency. "Agency" means any body of state governement authorized by law to adopt rules, to issue licenses, or to take final action in adjudicatory proceedings, including but not limited to, every authority board, bureau, commission, department or officer of the state governement so authorized; but the term shall not include the legislature, the governor and council, the courts, school districts, or municipalities, counties or other political subdivisions of the State.

Comment

Apart from the exceptions listed in the last clause, this definition is intended to be comprehensive and all-inclusive. The "authorized by law" clause makes the coverage of the Act coextensive with its scope.

Both the affirmative definition and the exemptions closely parallel to the provisions of the Massachusetts APA (30A M.G.L.A. §1[2]), the federal APA (5 U.S.C. §551[1]), and the Uniform Law Commissioners' Revised Model State APA (§1[1], 1970).

The reference to licenses is added for two reasons: first because not all licensing comes under the definition of "adjudicatory proceedings: and hence under coverage of the Act; and second, because subchapter V provides additional provisions concerning licensing.

3. Agency member. "Agency member" means an individual appointed or elected to the agency who is charged by statute with that agency's decision making functions, and does not include counsel to the agency or agency staff.

Comment

This definition designates those having final authority and decision making functions within the agency. An agency may have one or more "members." Examples are the eleven members of the Soil and Water Conservation Commission, 12 M.R.S.A. §51; the five members of each Indian Housing Authority, 22 M.R.S.A. §4731 et seq.; the three members of the Maine Board of Accounting, 32 M.R.S.A. §1.

4. Final agency action. "Final agency action" means a decision, the failure to make a decision or the equivalent by an agency in an adjudicatory proceeding or in licensing, which is dispositive of all issues, legal and factual, in said proceeding, and for which no further recourse, appeal, or review is provided within the agency.

Comment

This section is the key to judicial review of agency action under subchapter VII. It sets up the requirement that agency remedies be exhausted before recourse is had to the courts. The language "failure to make a decision, or the equivalent" seeks to insure that agency inaction or evasiveness having final consequences is not shielded from judicial review by the exhaustion doctrine.

The definition does not intend to change the traditional notion of what constitutes interlocutory rulings and that such rulings are not reviewable, subject to the limited exception in §2904 of the judicial review section. The wording was chosen simply as a feasible codification of what is "final".

5. License. "License" includes the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law.

Comment

The definitions of this term in all acts examined are very similar. The Revised Model State APA (§1 (3), 1970), goes on to exclude "A license required solely for revenue purposes."

6. Licensing. "Licensing" includes any agency activity respecting the grant, denial, renewal, revocation, suspension or modification of a license.

Comment

Several acts include such other terms as withdrawal, annulment, cancellation, limitation, amendment or conditioning in place of or in addition to the terms used in this definition. It is felt however, that the terms used are sufficiently broad to encompass all actions with respect to a license, particularly in view of the use of the term "includes," and that further specification would breed debate.

7. Party. "Party" to an adjudicatory proceeding means

A. the specific person whose legal rights, duties or privileges are being determined in the proceeding; and

B. any person participating fully in the adjudicatory proceeding pursuant to §2503. (1).

Comment

This provision defines the class(es) of persons who are entitled to assert the various rights accorded parties under subchapter III. Since the Act speaks throughout subchapter III of "parties" as

the holders of all rights there accorded, it is intended to exclude persons allowed limited participation in an adjudicatory proceeding under §2503(2) from the class of "parties." Such persons have their rights defined by the agency order referred to in that subsection.

This definition does not regulate who may be admitted by an agency as a party to its adjudicatory proceeding; specifically it does not preclude an agency from entitling any class of persons to party status through intervention, or admitting any person as a party in any hearing by order.

8. Person. "Person" means any individual, partnership, corporation, governmental entity, association or public or private organization of any character, other than an agency engaged in the particular rulemaking, advisory rulemaking, licensing, or adjudicatory proceeding.

Comment

This definition is intended to be broadly inclusive. It is taken almost verbatim from the proposed New York APA (102[6], 1969).

9. Rule.

A. "Rule" means the whole or any part of every regulation, standard, code, statement of policy, or other agency statement of general applicability that (1) has the force of law, or the violation of which may result in the imposition of sanctions and (2) implements, interprets or makes specific the law administered by an agency, or describes the procedure or practice requirements of an agency, including the amendment, suspension, or repeal of a prior rule.

B. The term does not include -

(1) policies or memoranda concerning only the internal management of an agency and not affecting the rights of or procedures available to the public; or

(2) advisory rulings issued under subchapter VI of this chapter; or

(3) decisions issued in adjudicatory proceedings; or

(4) any form, instruction or explanatory statement of policy which in itself has no legal effect, or the violation of which is not punishable by any sanction, and which is intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties or privileges.

Comment

This provision defines the subject matter of the rulemaking procedures which are specified in subchapter II. The definitions are fairly standard among the acts examined.

The definition is intended to be broad. The term encompasses both substantive and procedural rules, and includes both the adoption and withdrawal of rules.

The exceptions are all taken from other acts. Paragraphs (B)(1), (2) and (3) are standard, and the basis for their inclusion is self-explanatory. Paragraph (B) (4) is drawn from the proposed APA of the New York Law Revision Commission, (§102(2)(e), 1969). Paragraph (B)(2) and (4) are intended to facilitate and encourage the ready dispersal of advice and information about the agency, its policies and procedures to the public by plainly exempting these activities from the burdensome rulemaking requirements.

By contrast, any regulation etc. which the agency wishes to enforce must be promulgated through the rulemaking procedures of subchapter II. For example, guidelines against which applications for licenses are to be judged thus would be "rules" and would not fall within the exceptions.

SUBCHAPTER II
RULE MAKING

§2401 Adoption of Rules of Practice

In addition to other rule making requirements imposed by statute, each agency and the ~~administrative Court~~ shall adopt rules of practice setting forth the nature and requirements of all procedures available, including, but not limited to, rules prescribing procedures under subchapters III, V, and VI.

Comment

This section is based on the proposed New York Act §201 and does the work of §2302 in the first draft of the proposed Maine Act. The small number of procedures filed under the present Administrative Code led to the conclusion that stronger language was necessary. Rules adopted under this section are subject to the requirements of §2406.

§2402 Notice

At least thirty (30) days prior to the public hearing on the adoption of any rule the agency shall:

A. Publish notice

(1) At least twice in a newspaper of general circulation in the area of the State affected: and

(2) In any other trade, industry, professional or interest group publication which the agency deems effective in reaching persons affected: and

(3) In any other publication required by any statute.

B. Notify -

(1) Any person specified by any statute; and

(2) any person filing written request for notice of rulemaking, such request to be renewed annually, such notification shall be by mail or otherwise in writing to the last address specified by that person.

2. Notice shall

A. Refer to the statutory authority under which the adoption of the rule is proposed;

B. State the time of the public hearing and state the manner in which data, views or arguments may be submitted to the agency, whether orally or in writing;

C. If possible, contain the express terms of the proposed rule or, otherwise, describe the substance of the proposed rule, stating the subjects and issues involved, and indicate where a copy of the proposed rule may be obtained.

3. The agency may establish a fee schedule for notice under subparagraph (1)(B)(2), imposing a cost reasonably related to the actual expense entailed.

Comment

The substance of this section tracks the Massachusetts and New York acts, although their repeated provisions (§§2 and 3, Mass. Act; §202(1) and (2), N. Y. Act) are consolidated. The thirty day general rule is provided in order to make the opportunity for public comment meaningful. The "emergency" provisions of §2404 prevent this lead time from being a burden to the agency in crucial situations.

The content requirements seek to have the agency disclose as much as it knows about the proposed rule. Since an agency rarely starts rulemaking with no ideas, meaningful opportunity for comment means having something to comment on. The potential recipients under this section are somewhat more numerous than would be the case with standard published notice, with an eye to providing meaningful opportunity for comment to those who can make meaningful comments.

§2403 Rule making.

1. Prior to the adoption of any rule, the agency shall give notice as provided in §2402 and shall hold a public hearing.

2. The public hearing shall comply with any requirements imposed by statute, but shall not be subject to subchapter III.

3. Within ten days or such longer period as the agency may direct after the close of the public hearing, written statements and arguments concerning the proposed action may be filed with the agency.

4. The agency shall consider all relevant matter, including public comments, before adopting any rule.

Comment

Analagously to subchapter III, this section sets out the basic rulemaking procedure, which is subject to modification by the next section.

The Massachusetts Act has the requirement of a hearing turn on the type of sanction attending violation of the proposed rule; an appealing, but unexplained and rather complex approach. New York's proposed act ties the hearing requirement to the specification of other statutes. In line with the goal of simplification, the drafters feel, subject to comment, that this single procedure, as modified under §2404 is preferable.

In this and other sections, the language is limited to "adoption" of rules, because the definition of "rule" specifically includes amendment, suspension or repeal of previous rules.

Subsections 3 and 4 were suggested by the Attorney General's guidelines to the Massachusetts Act and intended to convey the idea that these proceedings are not pro forma.

§2404 Summary rulemaking.

1. If the agency finds that immediate adoption of a rule by procedures other than those set forth in §2403 is necessary to avoid an immediate threat to public health, safety or general

welfare it may modify said procedures to the minimum extent required to meet such findings. Such rule shall be subject to requirements of §.2406.

2. Any rule so adopted shall include the agency's finding and a statement of the reasons therefor, and said finding and reasons shall be subject to judicial review under § 2901.

3. Any emergency rule shall be effective only for 90 days. After the expiration of such 90 day period such rule shall not thereafter be adopted except in the manner as provided by §2403.

Comment

The exception provided by this section is limited to emergencies: situations where the requirement for a rulemaking hearing would result in dangerous delay which might prevent the rule from having the necessary effect. The use of "minimum extent" and the provision for judicial review under §2901 are meant to strictly circumscribe this exception.

§2405 Petition for adoption or modification of rules

1. Any person may petition an agency requesting the adoption or modification of any rule.

2. Each agency shall include in the rules of practice required by §2401 the form for such petitions and the procedure for their submission, consideration and disposition.

3. Within ninety days after submission, the agency shall either deny the petition in writing addressed to the person petitioning, stating its reasons for denial, or initiate rule-making proceedings concerning such petition in accord with this subchapter.

Comment

This provision for citizen input is found in somewhat less elaborate form in the New York (§204) and Massachusetts (§4) Acts.

The provisions of subsection (2) are derived from the Model Act §6 and are designed to prevent the agency from simply shredding all such petitions; this in the hope that there are therapeutic political effects to citizens seeing results from government. 5 M.R.S.A. §2354 currently covers this subject.

§2406 Filing and publication

1. With respect to every rule adopted under the procedures of this subchapter, the agency shall -

A. Prior to adoption submit the rule to the Department of the Attorney General for approval as to form and legality;

B. Within 14 days after adoption file a certified copy of the rule with the Secretary of State;

C. Print, compile and make available, at each of its offices, to any person, for inspection at no charge and for copying or purchase at actual reproduction cost, complete sets of such rules currently in effect;

D. Supply, at actual cost, copies of each such rule to any person filing written request to be supplied with all copies of such rules, such request to be renewed annually.

2. The Secretary of State shall -

A. Maintain and make available at his office, for inspection at no charge and for copying or purchase at actual cost, current copies of compete rules for all agencies filed in accordance with paragraph (1) (B).

B. Supply, at actual cost, annually updated copies of such complete sets of rules of an agency to any person filing written request to be supplied with such sets of rules, such request to be renewed annually.

3. The requirements of paragraphs 1(C) and 1(D) shall additionally be applicable to -

A. Written decisions issued in adjudicatory proceedings

B. Items defined in sub-paragraph 2302(9)(B)(4).

C. Advisory rulings issued under Subchapter VI.

4. In addition to the foregoing, each agency shall keep and make available for inspection to any person a record of the vote of each member of the agency on each matter coming before the agency.

Comment

The proposed New York Act contains a separate article (Art. 5) dealing with this subject, noting in the comments (p. 27) that many agencies already have met this requirement and that it is highly valuable to the practicing bar. The Massachusetts provision, which was not followed, places too many requirements on the Secretary of State and not enough on the agencies, in the drafter's opinion. The inclusions in subsection 3 are designed to make such items available to the public, especially as a check in situations where the agency is using them as precedent. 5 USC 552 of the Federal APA has similar provisions for such materials. Federal agencies also make available voting records, as a means of making agency members somewhat accountable for their decisions. The provision of subsection 4 parallels that in §2511.

§2407 Compliance

1. Rules adopted other than in the manner prescribed by §§2402, 2403 and 2404 shall be void and of no legal effect; provided that, insubstantial deviations from the requirements of §2402 shall not invalidate the rule subsequently adopted.

2. Rules not approved, filed and made available in the manner prescribed by paragraphs 2406(1)(A), 2406(1)(B) and 2406(1)(C) shall be void and of no legal effect.

3. The requirements of this subchapter do not relieve any agency from compliance with any statute requiring that its rules be filed with or approved by any designated person before they become effective.

Comment

This is an amalgamation of the compliance provision of the New York Act (§202-5, §203) and of the Massachusetts Act (§5). Subsection 1 is in accordance with most law concerning service of process and is intended to forgive clerical erros. The material in subsection 2 is intented to enforce public availability.

SUBCHAPTER III

ADJUDICATORY PROCEEDINGS

§2501 Disposition without full hearing.

Unless otherwise provided by law, agencies may

1. place on any party the responsibility of requesting a hearing if the agency notifies him in writing of his right to a hearing, and of his responsibility to request the hearing; and provide that failure to make such request shall operate as a waiver of that right;

2. make informal disposition of any adjudicatory proceeding by stipulation, agreed settlement, **or consent order;**

3. make informal disposition of any adjudicatory proceeding by default, provided that notice has been given that failure to take **any required action may result in default, and such default may be set aside for good cause shown.**

4. limit the issues to be heard or vary any procedure prescribed by agency rule or this subchapter if the parties and the agency agree to such limitation or variation, or if no prejudice to any party or the agency will result,

Comment

These provisions are derived from the Massachusetts APA (30A M.G.L.A. §10), and are intended to enable an agency to avoid the

expense of time and money, and the delay entailed in a full adjudicatory hearing where to do so does not prejudice the rights of the parties or the agency.

Many statutes require a hearing, and this section would not alter the basic requirement. Due process, however, is generally held to require only that a person have an opportunity for hearing before his rights or duties are determined. This standard is reflected in many other Maine statutes, and in the definition of "adjudicatory proceeding" above. Subsection (1) merely enables agencies to avoid holding hearings as a matter of course (when not required by statute), and places appropriate safeguards around use of this technique.

Subsection 2, substantially as written appears, in each other state APA examined. Subsection 3, however, expands on the standard language permitting default, in an attempt to avoid the unfairness that surrounds, or appears to surround, decisions by default.

Subsection 4 is standard practice for allowing the streamlining of proceedings, a practice approved in In re Maine Clean Fuels Inc. 310 A.2d 736 (1973).

§2502 Hearing on direction or request

When, by law or statute, a hearing is required only upon direction of the agency or upon request made in accordance with such provision by a person entitled to make such a request, the requirements of this subchapter governing the conduct of adjudicatory proceedings shall not apply unless and until such direction or request is in fact made.

Comment

This section essentially allows the agency to carry on its normal operations until direction or request, depending on the agency's particular statute and the applicable law, triggers the mechanism of this subchapter. It is especially significant with respect to the ex parte communication limits in §2504. The language used does not contradict the fact that every required hearing must be directed by or requested of the agency.

An example of the application of this section would be 38 M.R.S.A. §488. Under that provision, the DEP can either approve a site location application ex parte, order a hearing, or hold a hearing at the request of the applicant. The mechanisms of sub-chapter III would be triggered only in the latter two situations.

§2503 Public Participation

1. Intervention of Right. On timely application made pursuant to agency rules for form and manner of such application, the agency conducting the proceeding shall allow any person showing that he is or may be, or is a member of a class which is or may be, substantially and directly affected by the proceeding, and any other agency of federal, state or local government, to intervene as a party to the proceeding.

2. Permissive Intervention. The agency may further allow any other interested person to intervene and participate in a full or limited manner, as the agency may order.

3. Decision. When participation of any person is limited or denied, the agency shall include in the record any entry to that effect and the reasons therefor.

4. Consoldiation. Where appropriate, the agency may provide for consolitation of presentations of evidence and argument by members of a class entitled to intervene under subsection 1, or by persons allowed to intervene under subsection 2; provided that, no person entitled to intervene under subsection 1 shall thereby be prevented from raising any legal or factual argument.

5. Agency Staff Participation. The agency shall allow any of its staff to appear and participate in any adjudicatory proceeding.

Comment

This provision provides the general standards for intervention. It is drawn from the Massachusetts APA (30 M.G.L.A. §10). Several Maine state agencies have similar rules. It is felt that any person who can clearly make the requisite "direct and substantial" showing should have a right to intervene, (see United Church of Christ v. FCC) rather than making this intervention discretionally, as the Massachusetts act does. Allowing for intervention by class representatives prevents exclusion of persons directly, but not substantially, affected, as for example in utility rate cases. Persons who cannot make that showing to the satisfaction of the agency are not precluded from intervention; rather, intervention, and more importantly, the degree of participation, are left to agency discretion. It is important to note that persons allowing only limited participation under this provision are outside the definition of "parties", and have rights only "as the agency may order." The record provision guards against abuse of this power of limitation.

The provision allowing any government agency to intervene as of right was drawn from Rule 20.12(c) of the Maine Department of Environmental Protection. Every agency of government was created by a legislative body to administer and protect an important public interest. If an agency considered that interest so affected by an adjudicatory proceeding that it desired to assert the interest, it was felt that the agency conducting the adjudication should not have discretion to deny or restrict the interested agency's participation.

The agencies may, via the consolidation language, provide for presentations by spokesmen for classes admitted under subsection 1. However, membership in a class is simply one standard for a right to intervene, not a limitation on the arguments which may be advanced by intervenors. Therefore, a person intervening by reason of membership in a class of persons similarly situated may not thereby be limited or restricted in presenting his or her particular views on the issue which affects the class more broadly, should he or she at some point diverge from the class viewpoint. Such divergence would be subject to reasonable agency rules of practice in the interest of manageable proceedings, but could not be stifled. Intervenors allowed to participate under subsection 2 do not have this protection.

The final sentence comes from Public Utility Commission Rule 4.4 and is an affirmative direction to agencies of the propriety of participation by their staff in an advocacy role.

§2504. Ex parte Communciations; Separtion of Functions.

1. In any adjudicatory proceeding no person not employed by the agency and no employee or agent of the agency who participates in the proceeding in any testimonial, investigatory, prosecutory or other advocate capacity shall communicate ex parte, directly or indirectly, with any agency member or presiding officer or any employee or counsel involved in the decision making process in such proceeding with respect to the merits of such proceeding.

2. In any adjudicatory proceeding no agency member, presiding officer or any agency employee or counsel involved in the decision making process shall communicate ex parte directly or indirectly, with any employee or agent of the agency who performs-participates in the proceeding in a testimonial,investigatory, prosecutory or other advocate capacity, with respect to the proceeding.

3. In any adjudicatory proceeding if an ex parte communication is made in violation of subsection 1 or 2 such agency member, presiding officer, employee, counsel or agent shall promptly inform the agency of the substance of the communcation and the circumstances thereof. The agency may thereafter take such action as if considers appropriate including disqualification of such member,employee or agent from further participation in the proceeding, provided that any ex parte communication falling within the terms of this section made by a member of the public not a party to the proceeding shall be made part of the public records of the agency and placed in an appropriate file but shall not be considered by the agency in making its decision unless introduced into evidence.

4. A request for information with respect to the status of the proceeding shall not be deemed an ex parte communication.

Comment

This provision is considered among the most vital in the proposed Act, both because off the record communications between decisions-makers and advocates are so likely to be prejudicial to those parties not present, and because so many of Maine's administrative agencies are so small that the problem occurs frequently.

Two broad objects are intended: first, to plainly prohibit outside influences on the decision; and second, to equally plainly allow the decision maker access to the factual and legal assistance needed for an informed decision. Thus the basic prohibition extends equally to fact, law, and procedure. Confinement of factual argument to the record is clearly essential to impartiality. As to legal argument, the allowance of consultation with counsel and the Attorney General is sufficient to solve any legal quandries. Procedure is included because the procedural posture of a proceeding, especially where §2501 has been invoked, is often highly important to the outcome. The "status of the proceedings" is intended to cover all neutral procedural inquiries, such as times for hearing, deadlines for briefs, etc., which are necessary to the progress of the proceedings.

§2505 Notice

1. At the commencement of an adjudicatory proceeding, the agency shall give notice of the hearing to be conducted to the applicant or petitioner at whose request, or concerning whose legal rights, privileges, or duties the proceeding has been instituted, sufficiently in advance so as to afford adequate opportunity to prepare evidence and argument.

2. In any proceeding involving the determination of issues of substantial public interest, public notice shall also be given so as to provide interested persons adequate opportunity to petition to intervene pursuant to §2503 and to prepare evidence and argument.

A. Said public notice shall be given -

(1) by publication, at least twice in a newspaper of general circulation in the area of the state affected; and

(2) by publication in any other trade, industry, professional or interest group publication which the agency deems effective in reaching persons who would be entitled to intervene as of right under §2503; and

(3) in any other manner deemed appropriate by the agency.

3. Notice and public notice shall consist of -

A. a statement of the time and place of the hearing;

B. where applicable, a statement of the deadline for and manner of filing of applications for intervention or participation under § 2503;

C. a statement of the legal authority and jurisdiction under which the proceeding is being conducted;

D. a reference to the particular statutory and rule provisions involved;

E. a short and plain statement of the nature and purpose of the hearing and of the matters asserted.

Comment

In applying this section, agencies will be dealing with the fact that the extent of notice appropriate varies greatly depending on the nature of the proceeding. This section is drafted to preserve the flexibility thus made necessary.

The contemplated purpose of this section is not to sanction the least notice possible, but to permit tailoring of notice to the situation. A more precise formulation of situations where public notice is required would not be feasible in any workable length statute. Examples of proceedings with broad impact calling for broad participation would include the following: utility rate determinations, site location applications, proceedings involving milk prices, and environmental matters. At the other extreme would be unemployment compensation, workman's compensation, and other social welfare determinations for individuals, and, generally, license revocation proceedings; these matters, while crucial to the individuals involved, do not involve the same degree of regional or general interest.

§2506 Opportunity to be heard

1. The opportunity for hearing in an adjudicatory proceeding shall be afforded without undue delay.

2. Every party shall have the right to present evidence and argument on all issues, to call and examine witnesses and, without limitation under §2501(4), to make oral cross-examination of any witness.

Comment

This section makes explicit the rights of parties to fully present their case. The right of oral cross-examination is expressly not to be limited. The harmless error rule applies to this section as it does throughout the act. The draftsmen believe that In re Maine Clean Fuels, Inc. 310 A2d 736 (1973) must be read as limited to the fact of that case and that denial of cross-examination in that case constituted merely harmless error. Oral cross-examination is believed to be one of the best tools of the adversary process for contesting and establishing factual issues. The parties may, however, agree by stipulation to limit cross-examination. The hearing officer may, consistent with §2507(2), regulate such cross-examination.

§2507 Evidence

1. Unless otherwise provided by statute, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law.

2. Evidence shall be admitted and given probative effect if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude irrelevant or unduly repetitious evidence.

3. All witnesses shall be sworn.

4. Subject to these requirements, an agency may, for the purpose of expediting adjudicatory proceedings, adopt procedures for the pre-filing of all or part of the testimony of any witness in written form, which witness shall be subject to oral cross-examination.

Comment

This provision appears consistent with Maine case law regarding administrative proceedings, as stated in In re Maine Clean Fuels, Ind., 310 A.2d 736, (1973) and elsewhere.

The provision is adapted from the Massachusetts APA (30A M.G.L.A §II(2)), and is consistent with the federal APA (5 U.S.C. §556(d)) a the proposed New York APA (§306(1)).

Subsection 4 is adapted from the proposed New York Act, and is viewed as another means for an agency to minimize the costs and delays entailed in an adjudicatory proceeding.

§2508 Official Notice.

1. Agencies may take official notice of any facts of which judicial notice could be taken, and in addition may take official notice of general, technical or scientific facts within their specialized knowledge, and of statutes and regulations. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the material so noticed, or its materiality to the issues in the proceeding.

2. Material so noticed shall be included and indicated as such in the record.

3. Notwithstanding the foregoing, agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

Comment

This provision is drawn principally from the Massachusetts APA (30A M.G.L.A. §11 [5]), though the New York (§306 4) and Revised Model State (§10 [4]) acts are very similar. Standards for taking official and judicial notice are to be found in State v. Rush, Me., _____ A2d _____ (Law Docket No. 262, August 27, 1974).

§2509 Record

1. In an adjudicatory proceeding, the agency shall make a record, consisting of -

A. all applications, pleadings, motions, preliminary and interlocutory rulings and orders;

B. evidence received or considered;

C. a statement of material officially noticed;

D. questions and offers of proof, objections, and rulings thereon;

E. proposed findings and exceptions, if any;

F. the final decision, opinion or report by the presiding officer, if any;

G. the final decision of the agency;

H. all staff memoranda submitted to the members of the agency or other presiding officers by agency staff in connection with their consideration of the case.

2. The agency shall record all hearings in a form susceptible to transcription.

A. Portions of the record as required and specified in subsection 1 may be included in the recording.

B. The agency shall transcribe the recording upon service of a notice of appeal pursuant to §2904.

3. The agency shall make a copy of the record, including recordings made pursuant to subsection 2, available at its principal

place of operation, for inspection by any person, during normal business hours; and shall make copies of the record, copies of recordings, or transcripts of recordings available to any person at actual cost.

4. All material, including records, reports and documents in the possession of the agency, of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record, and no other factual information or evidence shall be considered in taking final agency action, including making findings of fact and conclusions of law.

5. Documentary evidence may be incorporated in the record by reference when the materials so incorporated are made available for examination by the parties before being received in evidence.

Comment

The itemized contents requirement for the record is taken from the Revised Model State APA, §9(e). Of special note is paragraph (1)(H), which provides a method for the reviewing court to police ex parte influence. The command that findings of fact be made strictly on the record is in the same vein.

The requirement of recording the proceedings parallels the provisions of Rule 76 of the District Court Civil Rules. The method of recording is not specified, that being left up to the agencies' ingenuity subject to the feasibility of transcription. The provision requiring availability of a copy of the record for public inspection is considered a minor price to pay for increased public information. Despite the fact that a person seeking a copy of the record must bear the cost, this cost is recoverable under §2906 in a successful challenge of agency action.

§2510 Subpoenas and Discovery

1. In conducting adjudicatory proceedings, agencies shall

issue, vacate, modify and enforce subpoena in accordance with the following provisions:

A. Agencies shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, relating to any issue of fact in the proceeding. The power to issue subpoenas may be exercised by the agency or by any person designated by the agency for such purpose.

B. The agency may prescribe the form of subpoena, but it shall adhere, insofar as practicable, to the form used in civil cases before the courts. Witnesses shall be subpoenaed in the same manner as witnesses in civil cases before the courts unless another manner is provided by any law. Witnesses subpoenaed shall be paid the same fees for attendance and travel as in civil cases before the courts, such fees to be paid by the party requesting the subpoena.

C. Any party to an adjudicatory proceeding shall be entitled as of right to the issuance of subpoenas in the name of the agency conducting the proceeding, except for subpoenas requiring the attendance of agency members or of the presiding officers in the instant proceeding. The party shall make written application to the agency, which shall forthwith issue the subpoenas requested. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

D. Any witness subpoenaed may petition the agency to vacate or modify a subpoena issued in its name. The agency shall give prompt notice to the party, if any, who requested issuance of the subpoena. After such investigation as the agency considers appropriate it may grant the petition in whole or part upon a finding that the testimony, or the evidence whose production is required, does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive or has not been issued a reasonable period in advance of the time when the evidence is requested.

E. Failure to comply with a subpoena lawfully issued in the name of the agency and not revoked or modified by the agency as provided in this section shall be punishable by a fine of not less than 500 and not more than 5,000 dollars, or by imprisonment not to exceed 30 days, or both.

6. Each agency having power to conduct adjudicatory proceedings may adopt rules providing for discovery to the extent and in the manner appropriate to its proceeding.

Comment

Subsection (3) of this section gives parties unlimited subpoenas as of right, with subsection (4) providing safeguards to the prospective witnesses, and subsection (5) providing for criminal penalties for disobedience. All except the last of these provisions are taken from the Massachusetts APA (30A M.G.L.A. §12). Criminal sanctions were deemed necessary to make an agency subpoena power of comparable credibility with that of the Courts.

Subsection (6) enables agencies to provide for discovery, by rule, if it deems such procedures appropriate to its proceedings.

§2511 Decisions

1. Every final agency decision in an adjudicatory proceeding shall be in writing or stated in the record, and shall include findings of fact and conclusions of law. A copy of the decision shall be delivered or promptly mailed to each party to the proceeding or his representative of record. Written notice of the party's rights to review or appeal of the decision within the agency or review of the decision before the courts, as the case may be, and of the action required and the time within which such action must be taken in order to exercise the right of review or appeal, must be given to each party together with the decision.

2. The agency shall maintain a record of the vote of each member of the agency in reaching the decision.

Comment

This section is taken substantially from the Massachusetts APA (30A M.G.L.A. §11(8)), and accords generally with every other act examined, with the present Maine Administrative Code, (5 M.R.S.A. §2407), and the rules of several state agencies.

The provisions regarding findings and conclusions are deemed sufficient, as legal terms of art, to require agencies to make the basis and rationale of their decision known in the decision.

The provision requiring notice of the action required to perfect a right of an appeal is not intended to require a technical recital of the rules of civil procedure. It simply involves making the party aware that there is a time limit and that certain action must be t aken to take an appeal from the agency decision.

The voting record provision parallels §2406.

§2512 Presiding Officers

1. An adjudicatory proceeding may have as presiding officer an agency member, employee or agent designated by the agency.

2. Hearings shall be conducted in an impartial manner.

A. Upon the filing in good faith by a party of a timely accusation of bias or of personal or financial interest, direct or indirect, of a presiding officer or agency member in the proceeding, the matter shall be included and determined by that accused person as part of the record, and the determination shall be subject to the tak of additional evidence and to review under subchapter VII.

B. Notwithstanding §2504, the accused person may consult with private counsel concerning the accusation.

3. Whenever a presiding officer is disqualified or it becomes impracticable for him or her to continue the hearing, another presiding officer may be assigned to continue with the hearing; provided that, if it is shown substantial prejudice to a party will thereby result, the substitute officer shall commence the hearing anew.

4. Subject to rules or limitations imposed by the agency, presiding officers may

(A) administer oaths and affirmations;

(B) rule on the admissibility of evidence;

(C) issue subpoenas and order discovery;

(D) regulate the course of the hearing, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;

(E) take other action authorized by statute or agency rule consistent with this subchapter.

5. In the event that the presiding officer prepares any report or proposed findings for the agency, such report or findings shall be in writing. A copy of such report or findings shall be provided to each party; and an opportunity shall be provided for response or exceptions to be filed by each party.

Comment

This section is adapted and expanded from the federal APA (5 U.S.C. §556 (c)) and the proposed New York Act (§§303,304). It is included to make explicit what might otherwise be uncertain. Note that the powers enumerated in subsection (4) are subject to the initial modifying clause in that subsection; the agency may modify or limit these powers of the presiding officer.

The provisions dealing with bias or interest parallel those in subchapter IV. Bias or interest is subject to special scrutiny on review in order to emphasize that at least a rudimentary separation of function at the decision-making level with the agency is required by due process.

SUBCHAPTER IV

ADMINISTRATIVE COURT

§2601 Administrative Court Judge

1. The Administrative Court, as heretofore established, shall be under the supervision of the Administrative Court Judge. The Administrative Court shall be a court of record and the Administrative Court Judge shall establish a seal.

A. Appointment of Administrative Court Judge.

The Administrative Court Judge, as heretofore appointed, shall be appointed by the Governor, with the advice and consent of the Council. He shall hold office for a term of 7 years and until his successor has been appointed and qualified.

B. Qualification of Administrative Court Judge

The Administrative Court Judge must be a member of the bar of the State. He shall devote full time to his judicial duties. He shall not practice law during his term of office, nor shall he during such term be the partner or associate of any person in the practice of law.

C. Salary

The Administrative Court Judge shall receive as annual compensation an amount which is $1,500 less than that of a Superior Court Justice. He shall be entitled to actual and necessary expenses in the performance of his duties. He may employ necessary clerical assistance.

D. Disqualification of Administrative Court Judge

Whenever the Administrative Court Judge determines that he is biased or has a personal interest or a financial interest, directly or indirectly, in a case which is before him, he shall disqualify himself from hearing that individual case.

The moving party shall, within 10 days thereafter, commence an action by filing or refiling his complaint in the District Court. Jurisdiction is granted to the District Court to hear and determine such matters and to enter such rulings and orders as the nature of the case may require. The case shall be heard in the District Court in accordance with the rules of the Administrative Court and the District Court Judge hearing the case shall render a written decision thereon. The court reporter from the Administrative Court shall transcribe the testimony as in cases before the Administrative Court Judge. An aggrieved party may appeal from the decision of the District Court Judge to the Superior Court as is provided in this Act, subchapter VII.

E. Retirement

Title 4, section 103, applicable to Justices of the Superior Court and to Judges of the District Court, is made applicable to the Administrative Court Judge.

Comments

This section is taken directly from the present Administrative Code, 5 M.R.S.A. §2401, with appropriate changes in terminology.

§2602. Jurisdiction

1. The Administrative Court shall have exclusive jurisdiction upon complaint of an agency to revoke or suspend licenses issued by such agency. Except as provided in Section 2705, no agency shall revoke or suspend any license other than by way of complaint to the Administrative Court.

2. The complaining agency shall retain every other power granted to it or necessarily implied by statute, except the power of revoking or amending licenses issued by it. Such retained powers shall include, but not be limited to, the granting or renewing of licenses, the investigating and determining the ground for the filing of a complaint under this section, and the prosecution of such complaints.

Comment

The draftsmen consider this to be one of the major portions of the proposed Act. The intent is to provide on a comprehensive statewide basis an impartial forum for the consideration of license revocation and suspension. Current Maine law permits some agencies to undertake such actions themselves. Other agencies currently covered by the Administrative Code must proceed before the Administrative Court. Section 2602 constitutes a major departure from current practice.

§2603. Procedure

1. Commencement. An agency shall commence a license revocation or suspension proceeding by filing a written complaint with the Administrative Court. A copy of the complaint shall be served on the defendant either by personal delivery in hand or by leaving it with a person of suitable age and discretion at his usual place of abode, or in the case of a corporation, at its usual place of business, or by mailing a copy of the complaint to the defendant. The complaint shall contain (1) a short and plain statement of the violation,

(2) the statute or rule alleged to have been violated, (3) the nature of the sanction sought to be imposed, and (4) the requirement that the defendant answer and request a hearing.

2. Answer; Request for Hearing. Within 20 days the defendant shall serve an answer on the agency, stating in short and plain terms his defenses to each claim asserted and he shall admit or deny the averments on which the agency relies. The defendant shall have the burden of requesting a hearing before the Administrative Court. Upon the receipt of such request for hearing the Administrative Court shall promptly schedule and notify the parties of a hearing on the complaint to be held no sooner than 30 days following such request.

3. Effect of Request for Hearing. If no hearing is requested the Administrative Court may decide the case on the basis of affidavits filed by the agency. If a hearing is requested, the rights of the defendant under any existing license shall not be effected until after a hearing and determination.

Comment

This section establishes a procedure for the commencement of license revocation actions. After service of the complaint the burden is on the licensee to request a hearing. If a hearing is requested the license remains in full force and effect pending a full evidentiary proceeding. If no hearing is requested, the Court may proceed to decide the case on the basis of affidavits submitted by the agency in support of its complaint.

§2604 Rules of Practice

The Administrative Court shall have the power to adopt, amend, repeal or modify rules governing the forms of complaints, pleadings and motions and the practice and procedure in the said Court. Said

rules shall neither abridge nor enlarge the substantive rights of any litigant. Such rules shall not be inconsistent with the provisions of Subchapter III. Said rules shall be filed with the Secretary of State in the manner required by section 2406(B).

Comment

This section is modeled partly on 4 M.R.S.A. §8. The intent is to provide some procedural flexibility to the Court without locking it into a particular procedural form. Since, however, the standards set forth in Subchapter III were thought to be minimum necessary procedural safeguards, the rules of the Administrative Court cannot be inconsistent with those provisions.

§2605. Emergency Proceedings

The Administrative Court and Superior Court shall have jurisdiction to temporarily revoke or suspend a license without notice or hearing upon the verified complaint of an agency. Such complaint shall be accompanied by affidavits demonstrating that such summary action is necessary to prevent an immediate threat to the public health, safety and welfare. Any order temporarily suspending or revoking such license shall expire within 30 days of issuance and may not be renewed. No bond shall be required of the complaining agency. Upon issuance of such order the Administrative Court shall promptly schedule a hearing on the agency's complaint which hearing shall take precedence over all other matters except older matters of the same character.

Nothing in this section shall be deemed to abridge or affect the jurisdiction of the Superior Court to issue any other injunctive relief or to exercise such other powers as may be authorized by law or rule of Court.

Comment

This section is a somewhat modified version of 5 M.R.S.A. §2404.

Unlike that statutory provision, however, this section provides for temporary ex parte relief where it can be shown that there is an immediate threat to public health, safety and welfare. As a check on this procedure, however, such ex parte orders are time limited and require the complaining agency to immediately proceed with its case.

The section is not intended to restrict equitable powers the Superior Court might otherwise have pursuant to MRCP Rule 65.

§2606. Judicial Review

Judicial review of any decision of the Administrative Court shall be taken in the manner prescribed by subchapter VII.

Comment

In order to provide a uniform manner of appellate review, appeals from the Administrative Court are handled in the same manner as appeals from an agency decision.

SUBCHAPTER V

LICENSING

§ 2701. Adjudicatory Proceedings.

When licensing is required as of constitutional right, or by statute, to be preceded by notice and opportunity for hearing, the provisions of subchapter III concerning adjudicatory proceedings shall apply.

Comment

This section says no more than that licensing functions may fall within the definition of adjudicatory proceedings, in which case subchapter III procedures apply.

§ 2702. Expiration.

Except as otherwise provided in this subchapter, when a licensee has made timely and sufficient application for renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall not expire until the application has been finally determined by the agency.

Comment

This section parallels the rule stated in subchapter VII of this Act, in 5 M.R.S.A. § 2451(3) of the present Administrative Code, and in Rule 80B(b) of the Rules of Civil Procedure, that a petition for review of final agency action will not stop enforcement of that action. Thus, a license due for renewal survives for the period pending agency action beyond the original expiration date, but no further.

§ 2703. Revocation and Amendment; Right to Hearing.

1. Subject to the provisions of §§2704 , an agency shall not amend, modify, or refuse to renew any license unless it has afforded the licensee an opportunity for hearing in conformity with subchapter III.

2. In any proceeding involving a proposed modification or amendment of a license which was the subject of an earlier adjudicatory proceeding, the agency shall re-open the earlier proceeding for consideration of the proposed amendment or modification, and shall give notice thereof to all parties to the earlier proceeding and in any other manner required by §2505.

Comment

This is the sole exception to the general rule that this act does not create any right to a hearing. Any action having the effect of taking away or changing a license requires the protections of subchapter III, subject to §2704. In the case of amendments or modifications, both the licensee and the public are protected from "quiet changes" which may equal the original issuance in substance. For example, a proposed modification of effluent limitations in a refinery permit would require the same public notice, notice to intervenors, and procedural protections applicable to the original application.

§2704 Automatic Cancellation

An agency may refuse to issue or renew any license without proceedings in conformity with subchapter III, if the decision to take such action rests solely on the result of a test or election, or solely on a conviction in court of any offense which provides the grounds for revocation.

Comment

The "test" or "election" language comes from 5 USC §554(a)(3) of the federal APA, although the drafters feel that the term "inspection" also used there is too subjective. The premise behind tests or elections is that the matter is capable of being objectively determined by some standard uniformly applied. In these cases the licensee's remedy should be a challenge of the testing process in court, pursuant to §2901.

The conviction language is drawn from certain motor vehicle statutes: there, conviction of certain violations warrants immediate revocation of license without a hearing, as due process was fully accorded in the criminal trial.

SUBCHAPTER VI

ADVISORY RULINGS

§2801 Advisory Rulings

1. On written request of any interested person, an agency may make an advisory ruling with respect to the applicability to any person, property or state of facts of any statute or rule administered by that agency.

2. All advisory rulings shall be in writing and shall be subject to the public availability requirements of §2406(1)(C), (D).

3. An advisory ruling shall not be binding upon an agency, provided, however, that in the event any person takes any action in reliance on such ruling and such ruling is later reversed by the agency or an appellate court, such reliance shall be considered in mitigation of any penalty which may later be assessed for action taken in reliance on such prior ruling.

4. Each agency shall prescribe by rule, in accordance with §2401, the procedure for the submission, consideration and disposition of requests for advisory rulings. In issuing an advisory ruling, the agency need not comply with the requirements of subchapters II or III.

Comment

The intention of this section is to enable and encourage agencies to advise persons subject to the laws the agency administers of the probable agency reaction to an existing condition or a planned course of conduct. If agencies are bound by such rulings, the commentators (Benjamin, N. Y. Law Review Commission, Cooper, Davis) generally agree that rulings simply will not be given, short of a much fuller fact-finding and consideration process, akin to an adjudication.

This provision may be thought unnecessary, since informal advice is and undoubtedly always will be given by nearly every agency official and employee. The provision will not change that. It will, however, accomplish two other things: (1) enable persons who have no "friend in the Bureau" to obtain advice; and (2) by requiring the establishment of procedures, assure that the advice is reliable, even if not binding, by assuring that it will be the product of consideration by a person qualified to render the advice. Subsection 3 provides protection for the recipient of an opinion who relies on such opinion only to have such ruling later reversed and find himself in violation of law.

The section combines provisions found in the Massachusetts APA (30 M.G.L.A. §8) and the proposed New York APA (§206). Subsection 2 is added to safeguard the situation where such rulings are effectively precedent for formal decision.

SUBCHAPTER VII

JUDICIAL REVIEW

§2901 Judicial Review; Rules

1. Judicial review of an agency's advisory ruling, rule or refusal or failure to adopt a rule where the adoption of such rule is required by law may be had by any person who is aggrieved in an action for declaratory judgment in the Superior Court conducted pursuant to 14 M.R.S.A. §5951 et seq, which chapter shall apply to such actions wherever not inconsistent with this section. In the event that the Court finds that a rule was improperly adopted or exceeds the authority of the agency it shall declare such rule invalid. In the event that the Court finds that an agency has failed to adopt a rule as required by law, the Court may issue such orders as are necessary and appropriate to remedy such failure.

2. The failure to seek judicial review of an agency rule or advisory ruling in the manner provided by subsection 1 shall not preclude judicial review thereof in any civil or criminal proceeding to enforce such rule or advisory ruling.

Comment

The purpose of this sub-section 1 is to provide a uniform method for review of agency rule-making. The subsection expands the traditional notions of "standing". This expanded concept was deemed beneficial to insure that agencies are responsive to all citizens of the State. It is unfair to permit only those who are the subject of the regulation to challenge it and not grant the same right to those whom the rule was designed to protect. Although standing is broadened it is felt that such provision will not unduly foster litigation, since, in most cases, litigants will be limited by the ordinary legal costs.

The Subsection 1 contemplates and permits suits to obtain judicial review of an agency's refusal to adopt a rule, where the agency's function is non-discretionary. In the event that the reviewing Court determines that the agency has wrongfully failed to exercise non-discretionary power it may issue such orders, including injunctions or mandatory injunctions, to remedy such failure.

Subsection 2 makes it clear that a rule may be challenged either in an enforcement proceeding or in an action against a regulated party seeking to enforce the rule.

§2902 Right to review: final agency action.

1. Any person who is aggrieved by final agency action shall be entitled to judicial review thereof in the Superior Court in the manner provided by this subchapter.

2. Where review or appeal of any agency action is directly to the Supreme Judicial Court such appeal shall be conducted in the manner provided by the Maine Rules of Civil Procedure and sections 2904(3), 2905(4), 2905(5) 2906 and 2907.

3. For purposes of this subchapter, final agency action includes decisions by the Administrative Court.

4. Preliminary, procedural, intermediate or other non-final agency action is reviewable under this subchapter only if review of the final agency action would not provide an adequate remedy.

Comment

The form adopted for this section indicates a judgment that replacement of the multitudinous provisions for review now on the books with one set of procedures contained in this subchapter is desirable in terms of greatly simplifying the practice of agency law and the task of the courts. The Massachusetts Act explicitly preserves existing methods of review, and the New York Act does not even address the issue for the same reason. The drafters feel, however, that the approach of this section is consistent with this Act's goal of simplification and standardization. The exception to this approach is for those issues already deemed by the Legislature to be so complex as to warrant appeal directly to the Law Court, most notably P.U.C. rate hearings.

This section incorporates a grant of jurisdiction for review to the Superior Court, thus avoiding the confusion caused by 5 USC §§702 and 703 of the federal APA. Also included is the presumption in favor of judicial review established by the Supreme Court in Abbott Laboratories v. Gardiner 387 US 136 (1967).

Subsection 4, contained in §15(a) of the Model Act, sets up a narrow exception for review of technically non-final action in cases where review of the final action would not be effective. See Isbrandtsen Co. v. U.S. 211 F 2d 51 (CADC 1954), cert. denied 347 U.S. 990 (1954).

§2903 Commencement of action

1. Proceedings for judicial review of final agency action shall be instituted by the filing of a notice of appeal stating the grounds for appeal in the Superior Court for the county --

A. Where one or more of the petitioners reside or have their principal place of business; or

B. Where the agency has its principal office; or

C. Where the activity or property which is the subject of the proceeding is located.

2. The Court may grant a change of venue for good cause shown.

after receipt of notice of the final agency action, or in the event of refusal to act, within six months after expiration of the time in which action should reasonably have occurred.

4. Within ten (10) days of the receipt of a notice of appeal, any other party to the proceeding may file a cross appeal in the manner provided by this subchapter.

Comment

This section is expanded from §14(1) of the Massachusetts Act. Provision for venue at the situs of the controversy is potentially useful for cases where a view of property might be needed, and is also less expensive for appellants. The time limit for review of inaction copies the language of Rule 80B, which is intended to reflect an equitable spirit tempered by the doctrine of Laches.

§2904 Service; parties

1. Service of the notice of appeal shall be made upon

A. the agency, one of its members, or its secretary or clerk; and

B. all parties to the agency proceeding in which the decision sought to be reviewed was made; and

C. The Attorney General.

2. Upon request, the agency shall certify to the appellant the names and addresses of all such parties as disclosed by its records, and service upon parties so certified shall be sufficient.

3. All parties to the proceeding before the agency shall be considered parties of record to the appeal.

4. The filing of a notice of appeal shall not operate as a stay of the agency action from which the appeal is taken; provided that the Court may, for good cause shown and on such terms as it deems just, stay the effect of any agency action pending final determination of such appeal.

Comment

This section is based on Massachusetts §14(2). It seeks to provide that parties which may not have been properly heeded by the agency shall be heard in court; and further, that persons who either did not or were not allowed to intervene before the agency may still be heard on a showing which convinces the court of their interest.

The notion that a notice of appeal is not of itself a stay, but may occasion one, is generally recognized and is found in the present Administrative Code, 5 M.R.S.A. §2451(3) and in Rule 80B of the Rules of Civil Procedure, and is reflected in §2702.

§2905 Answer; record for review; costs

1. The agency shall plead responsively as required by the Rules of Civil Procedure. The Superior Court shall thereafter confirm with the parties and set a schedule for the filing of the record of the agency proceeding and briefs by the parties. The records of the proceedings shall be filed with the court by the agency.

2. The expense of preparing the record may be assessed as part of the costs of the case, but shall not be so assessed against a party who is successful on the merits of his appeal; provided that the court may, regardless of the outcome of the case assess anyone unreasonably refusing to stipulate to limit the record for the additional costs of preparation entailed by such refusal.

3. The court may award costs of litigation, including reasonable attorney and expert witness fees, to appellants asserting

important public right or interest as determined by the court.

Comment

This section essentially follows §14(4) of the Massachusetts Act with modification in subsection 4 to make clear that a successful petitioner does not bear the cost of the record. Subsection 3 is derived from §505(d) of the Federal Water Pollution Control Act Amendments of 1972.

The basic record is enumerated in §2509, and may consist in part of transcripts of recordings as provided for in that section. Wherever feasible, the record for review consists of only a portion of this basic record.

Litigation costs awards help offset the cost of copies of the record required by §2509 and make citizen suits more feasible.

Subsection is designed to remedy in part the imbalance which has administration litigation and appellate review. The draftsmen are concerned that important public issues are never litigated because of the expense of such litigation. This is particularly true in cases involving so-called "public-interest" intervenors. While this section does not guarantee costs to litigants it is at least a first step toward insuring that the administrative/appellate process is a true adversary process and that legitimate points of view are not silenced for lack of resources.

§2906 Scope of record; additional evidence

1. Review shall be confined to the record, except as otherwise provided in this section.

2. In case of alleged irregularities in procedure before the agency which irregularities are not shown in the record, or in the case of accusations of prohibited ex parte communications, bias or interest under §2512, or in the case of alleged takings of property, the agency shall plea responsively, and evidence thereon shall be taken and determination made by the Court.

3. The court may order the taking of additional evidence before the agency if -

A. application is made to the court for leave to present additional evidence; and

B. it is shown to the satisfaction of the court that the additional evidence is material to the issues presented in the case; and

C. it is shown to the satisfaction of the court that such evidence could not have been presented or was erroneously disallowed in proceedings before the agency; and

D. the court finds that such additional evidence is necessary in deciding the appeal.

4. By reason of such additional evidence, the agency may modify its findings and decision, and shall file with the court, to become part of the record, the additional evidence together with any new findings or decision.

Comment

The court is required to take additional evidence as a special check on bias or interest on the part of the decision maker. Additionally, the complex issue of "taking" is left to the court: both because judges understand it somewhat better than administrators, and because requiring the agency to take evidence on "taking" assumes

that it will decide contrary to the applicant. In addition to the standards found in Massachusetts §14(6), remands for additional evidence are specifically conditioned on the relevance of such evidence to the appeal.

The other provisions derive from Massachusetts §§14(5) and 14(6) and are self-explanatory.

§2907 Manner and Scope of Review

1. Except where otherwise provided by statute or constitutional right, review shall be conducted by the court without a jury.

2. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

3. The court may affirm the action of the agency or remand the case for further proceedings, findings of fact, or conclusions of law.

4. The court may reverse or modify the action of the agency if the agency findings, inferences, conclusions, or decisions are:

A. in violation of constitutional or statutory provisions;

B. in excess of the statutory authority of the agency;

C. made upon unlawful procedure;

D. affected by other error of law; or

E. unsupported by substantial evidence on the whole record or supported exclusively by hearsay evidence.

F. unwarranted by facts found by the court on the record as submitted or as amplified under §2906(2) in those instances where the court is authorized to make independent findings of fact; or

G. arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of or refusal to exercise discretion.

Comment

This section is basically derived from §15(g) of the Model Act, with the significant substitution of the "substantial evidence" test for the "clearly erroneous" test. While this may be a matter of semantics in practice, the former is thought to indicate a stricter standard of review. Whether paragraph (4)(F) has any life beyond cases under §2906(2) is doubtful, as the Ben Avon rule is in disfavor. But see Pickering v. Board of Education 391 U.S. 563, 579, footnote 2 (1968). The harmless error rule is applicable here, as it is in other appropriate sections of the Act.

§2908 Judicial Review Where No Administrative Hearing Was Held

In the event of an appeal from a final agency decision made without an adjudicatory proceeding the Superior Court shall hear such appeal as any other civil case. The evidence heard by and record made before the Court shall be deemed to be that which would have been before the agency if it had held a hearing. Based on such evidence the Court shall determine whether the agency could have reasonably decided as it did. The Court shall not substitute its judgment for that of the agency in evaluating such evidence.

Comment

Since the act expressly does not establish any new rights to hearings where none presently exist. This initial limitation was premised on the fact that the sheer volume of business before State agencies precludes a hearing on every issue. Given that limitation, the result is that agencies will on occasion issue decisions without a hearing. In such cases there is no administrative record for review. Using the principal enunciated by the Law Court in Frank v. Assessors of Skowhegan, the act empowers the Superior Court to make a record and review it to determine whether, on the basis of such record, the agency could have reasonably decided as it did. The final limiting sentence reasserts the principal that the function of the appellate court is one of review and not of initial decision making.

§2909 Appeal to Law Court

1. The agency, the appellant, or any party to the review proceeding in the Superior Court under this subchapter may obtain review by appeal to the Supreme Judicial Court sitting as the Law Court. The appeal shall be taken as in other civil cases.

2. The Supreme Judicial Court shall have the power to make and amend rules of pleading, practice and procedure, supplementary to and not inconsistent with this subchapter, for the purpose of securing a simple, speedy, and effective judicial review of administrative action.

Comment

The specific provisions for appeal and for supplementary rules under this subchapter are self-explanatory.