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PROPOSED ADMINISTRATIVE PROCEDURE ACT

PREPARED BY

ADMINISTRATIVE LAW SECTION OF THE
MAINE BAR ASSOCIATION

AND

DEPARTMENT OF THE ATTORNEY GENERAL

This document is a working draft prepared by a joint committee of the Attorney General and Bar Association. It has not received the endorsement of the Attorney General, the Administrative Law Section or the Bar Association.

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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 reference to the Administrative Court, this definition follows closely the pattern of the Massachusetts APA, MASS. GEN. LAWS ANN. ch. 30A, § 1(1) (Supp. 1976); the New York APA, N. Y. STATE ADMINISTRATIVE PROCEDURE ACT § 102(3) (McKinney 1975); and the Uniform Law Commissioners' Model State APA § 1(2) (1970).

The inclusion of the Administrative Court clause is made necessary by section 2801 in subchapter VI. The minimum standards for adjudicatory proceedings should not be different depending upon who conducts the hearing.

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

2. Agency. "Agency" means any body of state government 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 government so authorized; but the term shall not include the legislature, the governor and council, the courts, the University of Maine, the Maine Maritime Academy, 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 parallel the provisions of the Massachusetts APA, MASS. GEN. LAWS ANN. ch. 30A, § 1(2) (Supp. 1976); the federal APA, 5 U.S.C. § 551(1) (1967); and the Uniform Law Commissioners' Revised Model State APA § 1(1) (1970).

The reference to licensesisincluded for two reasons: first because not all licensing comes under the definition of "adjudicatory proceedings" and, hence, under the coverage of the Act; and secondly, 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. It 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, ME. REV. STAT. ANN. tit. 12, § 51 (Supp. 1976); the five members of each Indian Housing Authority, ME. REV. STAT. ANN. tit. 22, § 4734 (Supp. 1975); the seven members of the Maine Board of Accounting, ME. REV. STAT. ANN. tit. 32, § 3971 (Supp. 1976).

4. Final agency action. "Final agency action" means a decision, the failure to make a decision, or the equivalent, by an agency which affects the legal rights, duties or privileges of specific persons, which is dispositive of all issues, legal and factual, 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. The definition is intended to make all agency decisions affecting one's legal rights, duties or privileges judicially reviewable not just those made in licensing or adjudicatory proceedings. 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's requirement that agency remedies be exhausted before recourse is had to the courts is intended to include provisions for rehearing, if available.

This definition does not intend to change the traditional notion of what constitutes interlocutory rulings or the nonreviewability of such rulings except as provided for in § 2901(1) 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 any part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law which represents an exercise of the state's regulatory or police powers.

Comment

The definitions of this term in all acts examined are very similar.

6. Licensing. "Licensing" means the administrative process resulting in 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.

7. Party. "Party" means:

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

B. any person participating in the adjudicatory proceeding pursuant to § 2604(1) or § 2604(2); or

C. any agency bringing a complaint to Administrative Court under § 2801.

Comment

This provision defines the class(es) of persons who are entitled to assert the various rights accorded parties under subchapter IV. 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 organizatio of any character, other than the agency conducting the proceeding.

Comment

This definition is intended to be broadly inclusive. It is taken almost verbatim from the New York APA, N.Y. STATE ADMINISTRATIVE PROCEDURE ACT § 102(6) (McKinney 1975).

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, including the amendment, suspension or repeal of any prior rule, 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 the agency, or describes the procedures or practices of the agency.

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 any person; or

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

(3) decisions issued in adjudicatory proceedings; or

(4) any form, instruction or explanatory statement of policy which in itself does not have force of law, 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 definition is fairly standard among the acts examined. It is intended to be broad, to encompass both substantive and procedural rules, and to include both the adoption and withdrawal of rules.

The exceptions are all taken from other acts. Paragraphs B(1), (2) and (3) are standard provisions while paragraph B(4) is drawn from the New York APA, N. Y. STATE ADMINISTRATIVE PROCEDURE ACT § 102(2)(b)(iv) (McKinney 1975). Paragraphs B(2) and B(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 regulations which an agency wishes to enforce must be promulgated through the rulemaking procedures of subchapter II.

SUBCHAPTER II
RULEMAKING

§ 2401 Adoption of Rules of Practice

In addition to other rulemaking requirements imposed by statute, each agency shall adopt rules of practice governing all procedures available, including, but not limited to, the conduct of adjudicatory proceedings, licensing proceedings and the rendering of advisory rulings.

Comment

This section is based on the New York APA, N.Y. STATE ADMINISTRATIVE PROCEDURE ACT § 201 (McKinney 1975). The small number of procedures filed under the present Administrative Code led to the conclusion that strong language was necessary. Rules adopted under this section are subject to the requirements of § 2406.

§ 2402 Rulemaking.

1. Prior to the adoption of any rule, the agency shall give notice as provided in § 2403 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 IV.

3. Written statements and arguments concerning the proposed rule may be filed with the agency within ten days after the close of the public hearing, or within such longer time as the agency may direct.

4. The agency shall consider all relevant information available to it, including public comments, before adopting any rule.

5. At the time of adoption of any rule, the agency shall adopt a written statement explaining the factual and policy basis for the rule.

Comment

This section sets out the basic rulemaking procedure, which is only subject to modification by § 2404. Subsection 1 alters present practice by requiring a public hearing before an agency may adopt a

rule. Under the Massachusetts Act, MASS. GEN. LAWS ANN. ch. 30A, §§ 2-3 (Supp. 1976), the type of sanction resulting from violation of the proposed rule determines whether a hearing will be held, an unexplained and rather complex approach. The New York APA, N. Y. STATE ADMINISTRATIVE PROCEDURE ACT § 202 (McKinney 1975), ties the hearing requirement to the specification of other statutes. In line with the goal of simplification it is felt that this single procedure, as modified by § 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 are intended to convey the idea that these proceedings are not pro forma. Subsection 5 will assist in judicial review and will insure that the agency explains the rationale for the rule.

§ 2403 Notice

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

A. Publish notice

(1) In a newspaper of general circulation in the area of the State affected, and shall publish a second notice in the same paper no more than fifteen (15) days before the hearing; 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 statute.

B. Notify

(1) Any person specified by the statute authorizing the rulemaking; and

(2) Any person who has filed within the past year a written request with the agency for notice of rulemaking. Notification under this subparagraph shall be by mail or otherwise in writing to the last address provided to the agency 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 and place of the public hearing and state the manner in which the 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 sub-paragraph (1)(B)(2), imposing a cost reasonably related to the actual expense entailed.

Comment

The substance of this section follows the Massachusetts Act, MASS. GEN. LAWS ANN. ch. 30A, § 2(1) (Supp. 1976), and the New York Act, N. Y. STATE ADMINISTRATIVE PROCEDURE ACT § 202(1)(a)-(c) (McKinney 1975). 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 in order to give the public something on which to prepare comments. Otherwise public opportunity to comment would be meaningless. The potential recipients under this section are more numerous than would be the case with standard published notice, with an eye toward providing opportunity for comment to all those who are most likely to be affected by the rule.

§ 2404 Emergency rulemaking.

1. If the agency finds that immediate adoption of a rule by

procedures other than those set forth in § 2402 and § 2403 is necessary to avoid an immediate threat to public health, safety or general welfare, it may modify those procedures to the minimum extent required to enable adoption of rules designed to mitigate or alleviate the threat found. Emergency rules shall be subject to the requirements of § 2406.

2. Any emergency rule shall include the agency's findings with respect to the existence of an emergency, and such findings shall be subject to judicial review under § 2408.

3. Any emergency rule shall be effective only for 90 days, or any lesser period of time specified in the emergency rule. After the expiration of the emergency period, such rule shall not thereafter be adopted except in the manner provided by § 2402.

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 § 2408 are meant to strictly circumscribe this exception.

§ 2405 Petition for adoption or modification of rules

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

2. Each agency shall designate the form for such petitions and the procedure for their submission, consideration and disposition.

3. Within ninety days after receipt of a petition, the agency shall either notify the petitioner in writing of its denial, stating the reasons therefor, or initiate appropriate rulemaking proceedings.

Comment

This provision for citizen input is found in less elaborate form in the Massachusetts Act, MASS. GEN. LAWS ANN. ch. 30A, § 4 (1966). The provisions of subsection 3 are derived from the Uniform Law Commissioners' Revised Model State APA § 6 (1970) and are designed to prevent the agency from simply shredding all such petitions; this is in the hope that there are therapeutic political effects when citizens see results from government. This subject is currently covered in ME. REV. STAT. ANN. tit. 5, § 2354 (1964).

§ 2406 Filing and publication

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

A. Submit the rule to the Attorney General for approval as to form and legality;

B. File a certified copy of the rule with the Secretary of State;

C. Print, compile and make available to any person, at each of its offices, for inspection at no charge and for copying without cost, or purchase at actual cost, complete sets of such rules currently in effect;

D. Supply, without cost, or at actual cost, copies of each such rule to any person who has filed with the agency within the past year a written request to be supplied with all copies of the agency's rules.

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 complete rules for all agencies filed in accordance with paragraph (1) (B) of this section:

B. Supply, at actual cost, annually updated copies of complete sets of rules of an agency to any person who has filed with the Secretary of State within the past year a written request for such sets of rules.

3. The requirements of paragraph (1) (C) shall additionally be applicable to items defined in § 2302 (9)(B)(4)

4. In addition to the foregoing, each agency shall keep, at its principal office, and make available for inspection to any person a record of the vote of each member of the agency taken in rulemaking proceedings.

Comment

This subject is currently covered in ME. REV. STAT. ANN. tit. 5, §§ 2351(4), 2352 - 3 (1964). Such provisions are highly valuable to the general public as well as to the practicing bar. The Massachusetts provision, MASS. GEN. LAWS ANN. ch. 30A, § 6 (Supp. 1976), was not followed as it places too many requirements on the Secretary of State and not enough on the agencies. 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. The federal APA, 5 U.S.C. § 552 (a) (Supp. 1976), has a similar provision for such materials and also for voting records as subsection 4 requires. The availability of voting records is a means of making agency members accountable for their decisions. Subsection 1(c) is not intended to make each agency office an official repository for rules, as the Secretary of State is under §2407(2), but is intended to aid the public by providing greater public access to agency rules.

§ 2407 Compliance

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

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

3. The requirements of this subchapter do not relieve any agency of the responsibility of 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, N. Y. STATE ADMINISTRATIVE PROCEDURE ACT §§ 202(5), 203 (McKinney 1975), and the Massachusetts Act, MASS. GEN. LAWS ANN. ch. 30A § 5 (Supp. 1976). Subsection 1 is in accordance with most law concerning service of process and is intended to forgive clerical errors. Subsection 2 is intended to enforce public availability.

§ 2408 Judicial Review of Rules

1. Judicial review of an agency rule, or of an agency's refusal or failure to adopt a rule where the adoption of a 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 provisions shall apply to such actions wherever not inconsistent with this section. Insofar as the Court finds that a rule was improperly adopted or exceeds the rulemaking authority of the agency it shall declare the rule invalid. In the event that 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 in the manner provided by subsection 1 shall not preclude judicial review thereof in any civil or criminal proceeding to enforce such rule.

Comment

The purpose of this subsection is to provide a uniform method for review of agency rulemaking. 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 nondiscretionary. In the event that the reviewing court determines that the agency has wrongfully failed to exercise nondiscretionary power, it may issue such orders, including injunctions, to remedy such failure. Subsection 2 makes it clear that a rule may be challenged in an enforcement proceeding against a regulated party.

SUBCHAPTER III

ADVISORY RULINGS

§ 2501. Advisory Rulings.

1. Upon 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), and (D).

3. An advisory ruling shall not be binding upon an agency; provided, however, that in any subsequent enforcement action initiated by the agency which made the ruling, any person's justifiable reliance upon the ruling may be considered in mitigation of any penalty sought to be assessed.

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 IV.

Comment

This section is expanded from the Massachusetts APA, MASS. GEN. LAWS ANN. ch. 30A, § 8 (1966). 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, Cooper, Davis) generally agree that rulings simply will not be given, short of a much fuller factfinding and consideration process, akin to adjudication.

This provision may be thought unnecessary, since informal advice is and undoubtedly always will be given by nearly every agency official and employee. This provision will not change that. It will, however, accomplish two other things: (1) enable persons who have no "friend in the agency" 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 2 safeguards the situation where such rulings are effectively precedent for formal decision.

Subsection 3 provides protection for the recipient of an opinion who relies on such opinion only to have such ruling later reversed.

SUBCHAPTER IV

ADJUDICATORY PROCEEDINGS

§ 2601. Scope.

In any adjudicatory proceeding, except those proceedings involving either correctional facilities or the Parole Board, the procedures of this subchapter shall apply.

Comment

Proceedings involving correctional facilities and the Parole Board have been excluded because they are the subject of substantial constitutional decision which is greatly at variance with the procedures set forth in this subchapter.

§ 2602. 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;

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 make any required action may result in default, and further provided that any such default may be set aside by the agency 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 will result.

Comment

This provision is derived from the Massachusetts APA, MASS. GEN. LAWS ANN. ch. 30A, § 10 (1966), and is 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.

Many statutes require a hearing, and this section would not alter basic requirements. 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 proceedings," § 2302(1).

Subsection 1 enables agencies to avoid holding hearings, if not required by statute, as a matter of course, and places appropriate safeguards around use of this technique. Subsection 2, substantially as written, appears in each other state APA examined. Subsection 3 expands on the standard default language 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 (Me. 1973).

§ 2603. 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 an agency to carry on its normal operations until a 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 § 2605. 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 ME. REV. STAT. ANN. tit. 38, § 483 (Supp. 1973). 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 mechanism of this subchapter would be triggered only in the latter two situations.

§ 2604. Public Participation.

1. On timely application made pursuant to agency rules, the agency conducting the proceedings 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. The agency may, by order, allow any other interested person to intervene and participate as a full or limited pary to the proceeding. This subsection shall not be construed to limit public participation in the proceeding in any other capacity.

3. 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. Where appropriate, the agency may require consolidation 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.

5. 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, MASS. GEN. LAWS ANN. ch. 30A, § 10 (1966). 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, rather than making this intervention discretionary, 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.

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. Everyagency of government was created by a legislative body to administer and protect an important public interest. If an agency considers that interest so affected by an adjudicatory proceeding that it desires to assert the interest, it is felt that the agency conducting the adjudication should not have discretion to deny or restrict the interested agency's participation.

Subsection 4 is designed to give the agency flexibility. The agencies may, via the consolidation language in subsection 4, provide for presentations by spokesmen for classes admitted under subsections 1 and 2. Membership in a class, however, is simply one standard for a right to intervene and is not a limitation on the arguments which may be advanced by intervenors. Thus, 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.

The final sentence comes from Public Utility Commission Rule 4.4 and is an affirmation of the propriety of participation by agency staff in an advocacy role.

§ 2605. Ex parte Communications; Separation of Functions.

1. In any adjudicatory proceeding, no agency members authorized to take final action or presiding officers designated by the agency to make findings of fact and conclusions of law shall communicate, directly or indirectly, in connection with any issue of fact, law or procedure, with any person, except upon notice and opportunity for all parties to participate.

2. This section shall not prohibit any agency member or other presiding officer described in subsection 1 from:

A. communicating in any respect with other members of the agency or other presiding officers, or

B. having the aid or advice of agency staff or counsel

Comment

This provision is considered among the most vital in the proposed Act, both because off the record communications between decision-makers and advocates are so likely to be prejudicial to those parties not present, and because 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 is sufficient to solve any legal quandries. Procedure is included because the procedural posture of a proceeding, especially where §2602 has been invoked, is often determinative of the outcome. Section 2(B) is required as a practical matter since members need to have the help of staff to evaluate evidence in the record. It is not intended to allow staff to bring any new evidence to the attention of the decision makers as to do so would be in violation of §2610(1)(H) and (4).

Communications between the parties are not regulated. Nor is the prohibition viewed as prohibiting the agency or an agency member from making an initial prosecuting decision - i.e., that facts presented to him constitute a prima facie case and that an adjudicatory proceeding should be instituted.

§2606. Notice.

1. At the commencement of an adjudicatory proceeding, the agency shall give notice of the hearing 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 and submit 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 prepare and submit evidence and argument and to petition to intervene pursuant to §2604. Said public notice shall be given

A. by publication, at least twice in a newspaper of general circulation in the area of the state affected; and

B. 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 §2604(1); and

C. 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 applications for intervention or participation under § 2604 or otherwise;

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

D. a reference to the particular substantive 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 upon 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.

§ 2607. Opportunity to be heard

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

2. Unless limited by stipulation under § 2602(4) or by agency order pursuant to § 2604(2) or (4) or otherwise limited by the agency to prevent repetition or to prevent unreasonable delay in proceedings, every party shall have the right to present evidence and arguments on all issues, to call and examine witnesses and to make oral cross-examination of any person present and testifying.

Comment

This section makes explicit the rights of parties to fully present their case. The right of oral cross-examination is expressly not limited. The harmless error rule applies to this section as it does throughout the act. The drafters believe that In Re Maine Clean Fuels, Inc., 310 A.2d 736 (Me. 1973), must be read as limited to the facts of that case. 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 the issues or cross-examination. The hearing officer may, consistent with § 2608(2) or § 2604(4), regulate or eliminate such cross-examination.

§ 2608 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 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 purposes of expediting adjudicatory proceedings, require procedures for the pre-filing of all or part of the testimony of any witness in written form; however, every such witness shall be subject to oral cross-examination.

5. No sworn written evidence shall be admitted unless the author is available for cross-examination or subject to subpoena, except for good cause shown.

Comment

This provision appears consistent with Maine case law regarding administrative proceedings; See In Re Maine Clean Fuels, Inc., 310 A.2d 736 (Me. 1973). It is adapted from the Massachusetts APA, MASS. GEN. LAWS ANN. ch. 30A, § 11(2) (1966), and is consistent with the federal APA, 5 U.S.C. § 556(d) (1967). Subsection 4, adapted from the New York

APA, N. Y. STATE ADMINISTRATIVE PROCEDURE ACT § 306(1) (McKinney 1975), is viewed as another means for an agency to minimize the costs and delays entailed in an adjudicatory proceeding.

§§ 2607 and 2608 establish four classes of evidence: (1) that given by those present and testifying, (2) prefiled testimony, (3) sworn affidavits, and (4) all other evidence. The first three classes are all subject to cross-examination. These sections refer only to the admissibility of evidence, however, and are not intended to affect the common law rule that an agency may determine the weight of the evidence received.

§ 2609 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 substance or materiality of the facts noticed.

2. Facts officially 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, MASS. GEN. LAWS ANN. ch. 30A, § 11(5)(1966), though the New York APA, N. Y. STATE ADMINISTRATIVE PROCEDURE ACT § 304 (4) (McKinney 1975), and the Uniform Law Commissioners' Revised Model State APA § 10(4)(1970) are very similar. Standards for taking official and judicial notice are to be found in State v. Rush, 324 A.2d 748 (Me. 1974).

§ 2610 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 facts officially noticed;

D. offers of proof, objections and rulings thereon;

E. proposed findings and exceptions, if any;

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

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. Portions of the record as required and specified in subsection 1 may be included in the recording. The agency shall transcribe the recording when necessary for the prosecution of an appeal.

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 rendering a decision, as set forth in § 2612, 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 Uniform Law Commissioners' Revised Model Act § 9(e)(1970). 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 Maine District Court Rules. The method of recording is left 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. The fact that a person seeking a copy of the record must bear the cost, should not deter public interest since this cost may be recoverable under § 2907(5).

§ 2611 Subpoenas and Discovery

1. In conducting adjudicatory proceedings, agencies shall issue, vacate, modify and enforce subpoenas 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 that 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 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. 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 who requested issuance of the subpoena. After such investigation as the agency considers appropriate, it may grant the petition in whole or in 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 dollars and not more than 5,000 dollars, or by imprisonment not to exceed 30 days, or both.

2. 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 1 (C) of this section gives parties unlimited subpoenas as of right, with subsection 1 (D) providing safeguards to the prospective witnesses, and subsection 1 (E) providing for criminal penalties for disobedience. All except the last of these provisions are taken from the Massachusetts APA, MASS. GEN. LAWS ANN. ch. 30A, § 12 (1966). Criminal sanctions were deemed necessary to make an agency subpoena power of comparable credibility with that of the courts.

Subsection 2 enables agencies to provide for discovery by rule, if it deems that such procedures are appropriate to its proceedings.

§ 2612 Decisions

Every agency decision made at the conclusion of an adjudicatory proceeding shall be in writing or stated in the record, and shall include findings of fact and conclusions of law. The agency shall maintain a record of the vote of each member of the agency with respect to the agency decision. 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 by 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, shall be given to each party with the decision.

Comment

This section is taken substantially from the Massachusetts APA, MASS. GEN. LAWS ANN. ch. 30A, § 11(8)(1966), and is generally in accord with other acts examined, present Maine Administrative Code, ME. REV. STAT. ANN. tit. 5, § 2407(1964), and the rules of several state agencies. The term agency decision rather than final agency action is used so that decisions of all intermediary steps will be included; for example, decisions regarding unemployment benefits made by a deputy, an appeal tribunal or the Employment Security Commission pursuant to ME. REV. STAT. ANN. tit. 26, § 1194 (Supp. 1975).

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 decisions known in their decision. The provision requiring notice of the action required to perfect a right of appeal is not intended to require a technical recital of the rules of civil procedure but rather to make the party aware that there is a time limit and that certain action must be taken to take an appeal from the agency decision. The subsection 2 voting record provision parallels § 2406(4).

§ 2613 Presiding Officers

1. An agency may authorize any agency member, employee or agent to act as presiding officer in any adjudicatory proceeding.

2. 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 the party will thereby result, the substitute officer shall commence the hearing anew.

3. Subject to rules or limitations imposed by the agency presigin officers may

A. administer oaths and affirmations;

B. rule on the admissiblity 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 evidence, briefs and other written submissions.

E. take other action authorized by statute or agency rule consistent with this sub-chapter.

4. 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)(1967), and the New York APA, N. Y. STATE ADMINISTRATIVE PROCEDURE ACT §§ 303-4 (McKinney 1975). It is included to make explicit what might otherwise be uncertain. Note that the powers enumerated in subsection 3 are subject to the initial modifying clause in that subsection, hence the agency may modify or limit these powers of the presiding officer.

§ 2614 Bias of Presiding Officer or Agency Member

1. Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely charge of bias or of personal or financial interest, direct or indirect, of a presiding officer or agency member in the proceeding, the agency shall determine the matter as a part of the record, and the determination shall be subject to review under subchapter VII.

2. Notwithstanding § 2605, the person involved may consult with private counsel concerning the charge.

Comment

This provision is adapted from the New York APA, N. Y. STATE ADMINISTRATIVE PROCEDURE ACT § 303 (McKinney 1975). Bias or interest is subject to special scrutiny on review.

§ 2615 Enforcement

The agency shall be entitled to enforce its order in the courts by way of injunction or other appropriate legal remedy.

SUBCHAPTER V
LICENSING

§ 2701 Adjudicatory Proceedings

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

Comment

This section says no more than that if licensing functions fall within the definition of adjudicatory proceedings, subchapter IV 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, the existing license shall not expire until the application has been finally determined by the agency.

Comment

A license due for renewal survives for the period pending agency action beyond the original expiration date, but no further. This parallels the rule stated in subchapter VII of this act, in present Administrative Code, ME. REV. STAT. ANN. tit. 5, § 2451(3) (1964), and in Rule 80B(b) of the Maine Rules of Civil Procedure, that a petition for review of final agency action will not stop enforcement of that action.

§ 2703 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 IV.

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 § 2606.

Comment

This section creates a right to the protection of subchapter IV, subject to § 2704, for any action which has the effect of taking away or changing a license. 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 proptections applicable to the original application.

§ 2704 Action Without Hearing

An agency may revoke, suspend, or refuse to issue or renew any license without proceedings in conformity with subchapter IV, 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 the federal APA, 5 U.S.C. § 554(a)(3) (1967). It is felt that the term "inspection" also used in that act is too subjective. The premise behind the test or election 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 to 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
ADMINISTRATIVE COURT

§ 2801. Jurisdiction of Administrative Court; Retained Powers of Agency.

1. Except as provided in § 2704 or § 2803, the Administrative Court shall have exclusive jurisdiction upon complaint of an agency to revoke or suspend licenses issued by such agency.

2. The complaining agency shall retain every other power granted to it by statute or necessarily implied therein, except the power of revoking or suspending licenses issued by it. Such retained powers shall include, but not be limited to, the granting or renewing of licenses, the investigating and determining of grounds 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 as it is a major departure from current practice. 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. The intent is to provide on a comprehensive statewide basis an impartial forum for the consideration of license revocation and suspension.

§ 2802. Rules of Practice

The Supreme Judicial Court shall have the power to adopt, amend, repeal or modify rules governing the forms of complaints, pleadings and motions and the practice, procedure and evidence in the Administrative Court. Said rules shall neither abridge nor enlarge the substantive rights of any litigant. Such rules shall be filed with the Secretary of State in the manner required by § 2406(1)(B).

Comment

This section is modeled partly on ME. REV. STAT. ANN. tit. 4, § 8 (1964). The intent is to provide some procedural flexibility to the Court. Since, however, the standards set forth in subchapter IV were thought to be the minimum necessary procedural safeguards, the rules of the Administrative Court cannot be inconsistent with those provisions.

§ 2803. Emergency Proceedings.

The Administrative Court and Superior Court shall have concurrent 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. 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 on the docket of the Court. Any order temporarily suspending or revoking a license shall expire within 30 days of issuance unless renewed by the issuing Court after such hearing as it may deem necessary.

Nothing in this section shall be deemed to abridge or effect 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 ME. REV. STAT. ANN. tit. 5 § 2404 (1964). 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 or 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. This section is not intended to restrict equitable powers the Superior Court might otherwise have pursuant to Rule 65 of the Maine Rules of Civil Procedure.

§ 2804. Decisions.

Every final decision of the Administrative Court shall be in writing or stated in the record, and shall include findings of fact and conclusions of law. A copy of the decisions 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 of the decision by the Superior Court, and of the action required and the time within which such action must be taken in order to exercise the right of review, must be given to each party together with the decision.

§ 2805. Judicial Review.

Judicial review of an Administrative Court decision may be had in the Superior Court in the manner provided by subchapter VII.

§ 2901. Right to Review

1. Except where a statute provides for direct review by the Supreme Judicial Court and to the extent judicial review is specifically limited by statute, 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. Preliminary, procedural, intermediate or other non-final agency action shall be independently reviewable only if review of the final agency action would not provide an adequate remedy.

2. For purposes of this subchapter, the term "final agency action" includes decisions of the Administrative Court.

Comment

The form adopted for this section indicates a judgment that replacing the multitudinous provisions for review now existing with one set of procedures id desirable in order to greatly simplify the practice of agency law and the task of the courts. The drafters feel that this approach 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 Public Utility Commission rate hearings.

This section establishes a presumption in favor of judicial review. See Abbott Laboratories v. Gardiner, 387 U.S. 136 (1967). This section specifically allows persons who were not parties to the agency or Administrative Court proceeding to initiate review; however, such persons' appeals may be limited to questioning the application of law to the facts the agency found since § 2906(1)(B) limits the additional evidence which may be heard on review.

The second sentence in subsection 1, taken from the Uniform Law Commissioners' Revised Model State APA § 15(a)(1970), establishes 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 (C.A.D.C. 1954), cert. denied 347 U.S. 990 (1954).

Subsection 2 makes it clear that Administrative Court decisions are subject to the same review procedures as agency decisions.

§ 2902. Commencement of Action

1. Proceedings for judicial review of final agency action shall be instituted by filing a petition for review in the Superior Court for the county where

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

B. the agency has its principal office; or

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

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

2. All parties to the proceeding before the agency or Administrative Court and the agency, in review of agency decisions, shall be considered parties of record to the review proceeding.

3. The petition for review shall specify the person(s) seeking review, the manner in which they are aggrieved, and the final agency action which they wish reviewed. It shall also contain a concise statement as to the nature of that action, the grounds upon which relief is sought, and a demand for relief, which may be in the alternative.

4. The petition for review shall be filed within thirty (30) days after receipt of notice if taken by a party to the proceeding of which review is sought. Any other person aggrieved shall have forty (40) days from the date the decision

from an agency's refusal to act, the petition for review must be filed within six (6) months of the expiration of the time within which the action should reasonably have occurred. Cross-petitions, which may be for enforcement or review, shall be filed within fifteen (15) days of the filing of petition for review.

Comment

The section is expanded from the Massachusetts APA, MASS. GEN. LAWS ANN. ch. 30A, § 14(1)(Supp. 1976). Provision for venue at the situs of the controversy is potentially useful for cases where a veiw of the property might be needed and may also be less expensive for the petitioner Subsection 2's designation of all parties to the earlier proceeding as parties to the review proceeding seeks to provide parties, who be definition are interested in and affected by the decision, another opportunity to be heard. Subsection 4 attempts to give parties and nonparties equal opportunity to seek review by relating the available time period to the means by which they are most likely to receive notice of the decision. The time limit for review of inaction copies the language of Rule 80B of the Maine Rules of Civil Procedure, a rule intended to reflect an equitable spirit tempered by the doctrine of laches.

§ 2903 Service

1. The petition for review shall be served by certified mail, return receipt requested, upon

A. the agency;

B. all parties to the agency or Administrative Court proceeding;

C. the Attorney General; and

D. in the case of review of an Administrative Court decision, the Administrative Court.

2. Upon request, the agency or Administrative Court shall certify to the petitioner the names and addresses, as disclosed by its records, of all parties to the proceeding in which the decision sought to be reviewed was made, and service upon parties so certified shall be sufficient.

Comment

This section is based upon the Massachusetts APA, MASS. GEN. LAWS ANN. ch. 30A, § 14(2)(Supp. 1976).

§ 2904 Stay

The filing of a petition for review shall not operate as a stay of the final agency action pending judicial review. Application for a stay of a decision of an agency or the Administrative Court shall ordinarily be made first to the agency or Administrative Court, which may issue a stay upon a showing of irreparable injury to the petitioner, a strong likelihood of success on the merits, and no substantial harm to adverse parties or the general public. A motion for such relief may be made to the Superior Court, but the motion shall show that application to the agency or Administrative Court for the relief sought is not practicable, or that application has been made to the agency or Administrative Court and denied, with the reasons given by it for denial, or that the action of the agency or the Administrative Court did not afford the relief which the petitioner had requested. In addition, the motion shall show the reasons for the relief requested and the facts relied upon, which facts, if subject to dispute, shall be supported by affidavits. Reasonable notice of the motion shall be given to all parties to the proceeding

in the Superior Court. The court may condition relief under this rule upon the posting of a bond or other appropriate security, except that no bond or security shall be required of the state, or any state agency or an official thereof.

Comment

This section is based upon Rule 18 of the Federal Rules of Appellate Procedure. Under the present Administrative Code, ME. REV. STAT. ANN. tit. 5, § 2451(3)(1964), only the Superior Court has the authority to grant a stay. The drafters feel that the agency or Administrative Court is better able to determine the affects of a stay on various parties and the public interests. Requiring the agency or Administrative Court act first on a requested stay has the potential of saving much court time as they already are familiar with the facts. Not requiring a bond to be posted by the state, agency or official thereof is consistent with existing practice.

§ 2905 Responsive Pleading; Filing of the Record.

No responsive pleading need be filed unless required by order of the reviewing court. The agency or Administrative Court shall file in the reviewing court within thirty (30) days after petition for review is filed, or within such shorter or longer time as the court may allow on motion, the original or a certified copy of the complete record of the proceedings under review. All other parties shall file, within twenty (20) days after petition for review is filed, a written appearance which shall state his position with reference to affirmance, vacation, reversal or modification of the decision under review.

Comment

Not requiring responsive pleading and requiring the filing of written appearances is consistent with present practice under Rule 80B of the Maine Rules of Civil Procedure. This provision differs from the present Administrative Code, ME. REV. STAT. ANN. tit. 5, § 2451(4)(1964) in that it requires the transmission of the entire record to the reviewing court. It is felt this requirement will make the review procedures more efficient as it will eliminate delays due to disagreements between the parties as

the record on review.
to contents of/ Requiring a party to state his position with reference to the decision under review should help the court in its determination of a schedule for briefing and oral argument and will enable the petitioner to determine the position the parties below will take in the review proceeding.

§ 2906 Power of Court to Correct or Modify Record

1. Judicial review shall be confined to the record upon which the agency or Administrative Court decision was based, except as otherwise provided by this section:

A. In the case of alleged irregularities in procedure before the agency or Administrative Court which are not adequately revealed in the record, evidence thereon may be taken and determination made by the reviewing court.

B. The reviewing court may order the taking of additional evidence before the agency or Administrative Court if (1) it finds that additional evidence, including evidence concerning alleged unconstitutional takings of property, is necessary to deciding the petition for review; or (2) if application is made to the reviewing court for leave to present additional evidence, and it is shown that the additional evidence (a) is material to the issues presented in the review, and (b) could not have been presented or was erroneously disallowed in earlier proceedings before the agency or Administrative Court. After taking the additional evidence, the agency or Administrative Court may modify its findings and decisions, and shall file with the court, to become part of the record for review, the additional evidence and any new findings or decision.

C. If a required hearing was not held before the review proceedings were initiated, the reviewing court shall remand to the

agency or Administrative Court for a hearing in accordance with sub-chapter IV of this act.

D. In cases where final agency action was not required by statute to be made after an adjudicatory proceeding, the Court may either remand for hearing or conduct a hearing de novo.

2. The reviewing court may require or permit subsequent corrections to the record.

Comment

This section is based upon the Massachusetts APA MASS. GEN. LAWS ANN. ch. 30A, §§ 14(5)-(6) Supp. 1976). The court ~~is required to~~ may take additional evidence as a special check on improper procedure on the part of the decision maker in the agency or Administrative Court. Any other additional evidence must be taken before the agency or Administrative Court as the drafters feel that the agency and Administrative Court have more expertise in evaluating evidence of this nature. Requiring remand to the original fact finder for any evidence of substantive nature may settle review proceedings as after the additional evidence is taken a new decision may be rendered.

Subsection 1(C) is sufficient to compel agency action where it has been unlawfully withheld or unreasonably delayed, as similar provision in federal APA does, 5 U.S.C. § 706(1)(1967). Subsection 1(D) is meant to codify Frank v. Assessors of Skowhegan, 329 A.2d 167 (Me. 1974).

§ 2907 Manner and Scope of Review

1. The court, upon request or its own motion, shall set a schedule for the filing of briefs by the parties and for oral argument.

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

3. The court shall not substitute its judgment for that of the agency or the Administrative Court on question of fact.

4. The court may

A. affirm the decision of the agency or Administrative Court,

B. remand the case for further proceedings, findings of

fact or conclusions of law, or

C. reverse or modify the decision ~~if substantial rights of the petitioner were prejudiced because~~ if administrative findings, inferences, conclusions, or decisions are

1. in violation of constitutional or statutory provisions;

2. in excess of the statutory authority of the agency or Administrative Court;

3. made upon unlawful procedure;

4. affected by other error of law;

5. unsupported by substantial evidence on the whole record; or

6. arbitrary or capricious or characterized by abuse of discretion.

5. The court may award costs of litigation, including reasonable attorney and expert witness fees, to any party prevailing on the merits or to those who, though not successful on the merits, assert an important public right or interest as determined by the court. The cost of preparing the record may be assessed as part of the costs of the case.

Comment

This section is basically derived from the Uniform Law Commissioners' Revised Model State APA § 15(g) (1970) 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.

Subsection 5 is included because the drafters are concerned that important public issues are never litigated due to 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. This subsection should also deter frivolous review proceedings as the state may recover its costs if successful on the merits since under § 2302(7) governmental entities are included in the term "party".

§ 2908 Appeal to Law Court

1. 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, for the purpose of securing a simple, speedy, and effective judicial review under this subchapter.

Comment

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