

**JOINT STATE  
GOVERNMENT COMMISSION**  
General Assembly of the Commonwealth of Pennsylvania

**REFORMING THE  
ADMINISTRATIVE LAW  
OF PENNSYLVANIA**

**STAFF REPORT  
2014**



JOINT STATE GOVERNMENT COMMISSION  
*Serving the Pennsylvania General Assembly Since 1937*

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To the Members of the General Assembly of Pennsylvania:

House Resolution 247 of 2011 directed the Joint State Government Commission to study and make recommendations on the practice of administrative law before the Commonwealth's hearing boards. The central recommendation of this report is the adoption of a comprehensive statute revising and recodifying the current Administrative Agency Law in light of the Uniform Law Commission's Model State Administrative Procedure Act.

This report includes a draft Administrative Procedure Act, with source notes and official comments. Also included is a discussion of certain aspects of administrative law, particularly the most important reform proposed by the APA: the establishment of a central hearing panel to take the place of agency specific adjudicative bodies.

The Commission was guided in the drafting of the legislation and the report by a working group comprised of some of the Commonwealth's foremost experts on administrative law. Their knowledge and insight were extremely helpful in formulating this report, and the Commission is grateful for the advice and information received, and for the time and attention they put in to this project.

Sincerely,

Glenn Pasewicz  
Executive Director



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## EXECUTIVE SUMMARY

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This report is presented in response to 2011 House Resolution 247, which directed the Joint State Government Commission “to study and make recommendations to the General Assembly on the practice of administrative law before the Commonwealth’s hearing boards.” Administrative law governs cases where regulatory law is applied to specific individuals in particular cases, often in the context of professional licensure or public benefits. Where important rights are at issue, the Constitution requires a due process hearing, and administrative law prescribes the procedural requirements governing such hearings. (The substantive law is supplied by the statutes that authorize the establishment of the respective agencies and their programs.)

The current statutory law relating to administrative adjudications is the Administrative Agency Law, a barebones enactment that is clearly inadequate to requirements of our populous and industrialized Commonwealth. The Commission’s approach to the task of replacing the current law was to assemble a volunteer working group comprised of experts on administrative law and statutory drafting. The working group recommended that the project begin with the Model State Administrative Procedure Act drafted by the Uniform Law Commissioners. The working group devoted the bulk of its effort toward a line-by-line redrafting of the Model Act into the proposed Administrative Procedure Act (APA) presented in this report as Chapter V.

The draft APA that is the centerpiece of this report is intended do two things. The first is to set forth comprehensively the rules for due process for agency adjudications that will promote fair and efficient handling of cases. These rules govern such matters as notice of agency actions and the right to be heard, the conduct of the hearing, presentation of evidence, creation of the record, and appeal within the agency or to Commonwealth Court. The APA ensures that the employees within the agency who prosecute a case are not the same as those who decide the result, and that generally all parties have an opportunity to be heard at all discussions with adjudicators relating to the case.

Consistent with this aim of assuring both actual fairness and the appearance of fairness, the most important substantive proposal in the proposed APA is to establish an independent central hearing panel that would conduct the hearings and render decisions in administrative cases, thereby taking the place of the adjudicatory bodies within the respective agencies. When employees of an agency decide the outcome, there is at least the appearance of unfairness because the agency acts as judge in its own case. Even where the agency scrupulously maintains the separation of prosecutorial and adjudicative roles, it is likely that the in-house adjudicator will feel pressure to rule for the agency. If instead the case is decided by a member of a hearing panel that is independent of any agency, the result will appear to be fairer and will likely be fairer in reality. The statute establishes the Office of Administrative Hearings under the management of a chief administrative law judge and gives him or her the power to hire subordinate ALJs and other staff; it further provides the qualifications, powers, and duties of ALJs.

The question remains whether the agency head or the adjudicator should have the final decision making authority within the agency. The proposed legislation follows the Model Act by placing that authority with the agency head in order that the agency will retain full control of—and accountability for—its own policy. This has been a controversial issue, and is discussed in some detail in this report.

We hope this report will assist the General Assembly in addressing needed reforms to administrative procedure in Pennsylvania.

## INTRODUCTION

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This report is presented pursuant to 2011 House Resolution No. 247, which directed the Joint State Government Commission “to study and make recommendations to the General Assembly on the practice of administrative law within the Commonwealth.” (The resolution is attached as Appendix A.) The Commission assembled a working group of leading Commonwealth officials and legal practitioners within the field of administrative law. The group chose as its starting point the Revised Model State Administrative Procedure Act (the Model Act), proposed by the Uniform Law Commissioners, the originators of the Uniform Commercial Code and other important pieces of uniform and model state legislation. The group has carefully reviewed the parts of the Model Act relating to adjudicative procedure to adapt it to Pennsylvania practice. The working group completed a proposed Administrative Procedure Act, which appears in this report as Chapter V.

The commission would like to thank the members of the working group, who are listed in this report. We also thank K&L Gates for lending its facilities that enabled members of the working group to participate in drafting language without being physically present at a meeting. We would also like to thank Maureen O’Dea Brill for her perceptive suggestions and valuable staff work. The staff is grateful for the advice afforded by Mike Zimmer, Executive Director of the Michigan Administrative Hearing System, and Julian Mann III, Chief ALJ of the North Carolina Office of Administrative Hearings.

This report is a staff study of the Commission, and the Commission takes full responsibility for its contents. The members of the working group are not bound by its conclusions and recommendations, nor are they obligated to endorse the proposed APA.



# CHAPTER I

## CURRENT ADMINISTRATIVE PRACTICE AND PROCEDURE

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### Current State of Pennsylvania Administrative Law

Administrative law deals with the legal rules and procedures that guide statewide agencies in applying their Constitutional and statutory mandates to individual cases. The field governs topics such as workers' compensation, unemployment compensation, professional licensure, environmental law, and rate filings with the Insurance Commissioner or the Public Utility Commission. At the present time this vast field is formally regulated by the Administrative Agency Law, a set of 32 mostly brief sections of the Pennsylvania Consolidated Statutes, 16 of which deal with the important but relatively narrow issue of interpreters for the deaf and the hard of hearing.<sup>1</sup> Other than the interpreter provisions, the statutory law relating to administrative procedure as it applies to state agencies covers about six pages.<sup>2</sup> The Administrative Agency Law "is not comprehensive and, unfortunately, merely sets out an individual's right to a hearing, the right to an appeal, and the bare bones of adjudicatory procedure."<sup>3</sup>

HR 247 includes a nonexhaustive list of eight specific issues for consideration: professional qualifications and standards for hearing officers and ALJs; a centralized system for selection and oversight of hearing officers and ALJs; assignment of responsibility based on subject matter; separation of advocacy and adjudicatory roles; a uniform and understandable docketing system; centralized public access to decisions and opinions; consistent use of rules of evidence; and possible cost savings. Our statutory law is silent with respect to these issues, except for the following section on the rules of evidence: "Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted."<sup>4</sup>

Other issues that the proposed Pennsylvania APA addresses that are not dealt with in current law include the following:

- emergency hearings
- public access to hearings
- notice to parties
- ex parte communications<sup>5</sup>
- default adjudications

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<sup>1</sup> See 2 Pa.C.S. There are eight other sections dealing with administrative law as it relates to local agencies.

<sup>2</sup> See 2 Pa.C.S. §§ 101–106, 501–508 and 701–704 <http://dpc6.legis.state.pa.us/WU01/LI/LI/CT/HTM/02/02.HTM> (visited September 12, 2013).

<sup>3</sup> Gerald E. Ruth, "Unification of the Administrative Adjudicatory Process: An Emerging Framework to Increase 'Judicialization' in Pennsylvania," 16 *Jour. of the National Association of Administrative Law Judiciary* 221 (1996), 226.

<sup>4</sup> 2 Pa.C.S. § 505.

<sup>5</sup> Communications on a case with the adjudicator where at least one party to the case is absent from the discussion.

- official notice of facts
- contents of record for review
- internal agency review of adjudications
- stays pending administrative or judicial appeal
- public access to administrative opinions

Many Pennsylvania agencies have adopted the General Rules of Administrative Practice and Procedure (GRAPP),<sup>6</sup> which was drafted by the Joint Committee on Documents and promulgated on April 20, 1971. While the administrative agencies were not legally required to adopt GRAPP, many have, because it constitutes the only reasonably detailed body of rules widely available. Some practitioners approve of them as fair, reasonable, and efficient. Others maintain that GRAPP is “in dire need of modernization. There are times when the Rules require an agency to move far more slowly than necessary but, at the same time, there are components of [GRAPP] that frequently place the private litigant at a disadvantage.”<sup>7</sup> As the General Assembly is empowered to make broad policy decisions through legislation, it can address issues more comprehensively than the Joint Committee could.

## **Structure of Adjudicative Agencies**

The current structure pertinent to administrative adjudications is bifurcated. For the most part, agencies conduct their own adjudications, using an internal body that is separated from the rest of the agency to avoid a legally improper comingling of functions. There is also a Hearing Officer Program under the Governor’s Office of General Counsel that hears an appreciable proportion of the Commonwealth’s adjudications.

Table One lists the departmental and independent agencies that conduct their own adjudications. Table Two describes the utilization of the Hearing Officer Program, listing the agencies that use it and a description of the kinds of cases each agency uses the program for. The Office of General Counsel’s description of the Hearing Officer Program is included in this report as Appendix C. While the utilization of the Hearing Officer Program depends on the discretion of the respective agency heads, under the proposed APA, the use of a central hearing panel will be mandated by statute for all administrative agencies, except in those cases where an agency head decides to serve as a presiding officer.

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<sup>6</sup> 4 Pa. Code Ch. 31, 33, and 35.

<sup>7</sup> James J. Kutz, “GRAAP – A Perspective from the Private Practitioner,” Pennsylvania Bar Institute, *Administrative Due Process* (No. 2013-7854), 39.

**Table 1**  
**COMMONWEALTH BODIES CONDUCTING ADJUDICATIVE HEARINGS**

| <b>Executive Agency and Offices<br/>under Governor's Jurisdiction</b> | <b>Adjudicative Boards and Commissions<br/>under Governor's Jurisdiction</b>  |
|---|---|
| Office of Administration  |   |
| Aging   |   |
| Agriculture   | Horse Racing Commission<br>Harness Racing Commission  |
| Banking and Securities  |   |
| Budget  |   |
| Commission on Crime and Delinquency                                   |   |
| Community and Economic Development                                    | State Tax Equalization Board<br>Office of Open Records  |
| Conservation and Natural Resources                                    |   |
| Corrections   |   |
| Drug and Alcohol Programs   |   |
| Education   | Charter School Appeals Board<br>Private Licensed Schools Board<br>Professional Standards and Practices Commission<br>State Board of Education |
| PA Emergency Management Agency  |   |
| Environmental Protection  |   |
| General Services  |   |
| Health  |   |
| PA Housing Finance Agency   |   |
| Historical and Museum Commission                                      |   |
| PENNVEST  |   |
| Insurance   | Underground Storage Insurance Board (USTIB)   |
| Labor and Industry  | Workers' Compensation Office of Adjudication<br>Unemployment Compensation Referees<br>Unemployment Compensation Board of Review               |
| Military and Veterans' Affairs  |   |
| Probation and Parole  |   |
| Public School Employees' Retirement System                            |   |
| PA Municipal Retirement System  |   |
| Public Welfare  | Bureau of Hearings and Appeals  |
| Revenue   | Board of Appeals  |
| State   | Bureau of Professional and Occupational Affairs   |
| State Employees' Retirement System                                    |   |
| State Police  | Municipal Police Officers Training<br>and Education Commission  |
| Transportation  |   |

**Source:** Compiled by Linda C. Barrett, Senior Deputy General Counsel, Office of General Counsel.

***Independent Executive Agencies:***

- Auditor General
- Board of Claims
- Board of Pardons
- Civil Service Commission
- Environmental Hearing Board
- Fish and Boat Commission
- Game Commission
- Gaming Control Board
- Human Relations Commission
- Independent Regulatory Review Commission
- Judicial Conduct Board
- Liquor Control Board
- Milk Marketing Board
- Public Utility Commission
- State Ethics Commission
- Treasury
- Turnpike Commission

**Table 2**  
**AGENCY LIST AND UTILIZATION**  
**OF OGC HEARING OFFICER PROGRAM**

| <b>Executive Agency<br/>or Office Under<br/>Governor's Jurisdiction</b> | <b>Examples of<br/>Types of Cases</b>  | <b>Heard by<br/>OGC<br/>Hearing<br/>Officer</b>               |
|---|--|---|
| Office of Administration  |  | Yes   |
| Aging   | Long term care facility licensure issues   | Yes<br>(Also uses DPW's<br>Bureau of Hearings<br>and Appeals) |
| Agriculture   | Dog Law (kennel compliance issues)   |   |
| Horse Racing Commission<br>and Harness Racing Commission                | Ineligible horses, illegal drug use, racing violations,<br>ejections, driver and trainer licensure issues  | Yes   |
| Banking and Securities  | Appeals of suspension, revocation, or nonrenewals of<br>mortgage broker licenses   | Yes   |
| Budget  |  | Yes   |
| Commission on Crime<br>and Delinquency                                  | Appeals of denials of victim compensation  | Yes   |
| Community and Economic Development                                      | Act 47 determinations  | Yes   |
| State Tax Equalization Board  | Appeals of methodology utilized by the Board to compute<br>Common Level Ratios   | Yes   |
| Office of Open Records  | Right to Know Law appeals  | No  |
| Conservation<br>and Natural Resources                                   |  | Yes   |
| Corrections   | Appeals of Heart and Lung Act benefit denials  | Yes   |
| Drug and Alcohol Programs   | Licensure and revocation of drug and alcohol treatment<br>facilities   | Yes   |
| Education   | Appeals related to federal child and adult care food program,<br>Act 48 continuing education compliance, appeals of decisions<br>related to failure to meet annual yearly progress | Yes   |
| Charter School Appeals Board  | All matters related to charter schools   | Yes   |
| Private Licensed Schools Board  | Licensure issues   | Yes   |
| Approved Private Schools  | Certification and license issues.  | Yes   |
| Professional Standards<br>and Practices Commission                      | Teacher certification, discipline, and continuing education<br>matters   | Yes   |
| State Board of Education  | Transfer of school districts   | No  |
| PA Emergency<br>Management Agency                                       |  | Yes   |
| Environmental Protection  | Applications requesting an order pursuant to Section 407 of<br>the Oil and Gas Conservation Law establishing well spacing<br>and drilling units                                    | Yes   |
| General Counsel   | Appeals of decisions denying indemnification and<br>representation   | Yes   |
| General Services  | Contractor debarment proceedings   | Yes   |
| Health  | EMT licensing, drug and alcohol facility licensing, nurse<br>technician registry appeals, WIC Program disqualification<br>appeals  | Yes   |

**Table 2**  
**AGENCY LIST AND UTILIZATION**  
**OF OGC HEARING OFFICER PROGRAM**

| <b>Executive Agency<br/>or Office Under<br/>Governor's Jurisdiction</b>                               | <b>Examples of<br/>Types of Cases</b>   | <b>Heard by<br/>OGC<br/>Hearing<br/>Officer</b> |
|---|---|---|
| PA Housing Finance Agency   |   | Yes   |
| Historical<br>and Museum Commission   |   | Yes   |
| PENNVEST  |   | Yes   |
| Insurance   | Rate cases, claim denials for reimbursement from the Underground Storage Insurance Fund (USTIF)   | No  |
| Labor and Industry  | Prevailing wage, unemployment tax assessment appeals, appeal filed by provider from an administrative decision of the Bureau of Workers' Compensation's Medical Fee Review Section's fee determination, ordinance challenges, lead certification challenges, construction code challenges, challenges related to decision of the Office of Vocational Rehabilitation (OVR), Bureau of Blindness and Visual Services (BBVS), Business Enterprise Program (BEP) | Yes   |
| Workers' Compensation Office of Adjudication  | Workers' Compensation   | No  |
| Unemployment Compensation Referees  | Unemployment Compensation   | No  |
| Unemployment Compensation Board of Review   | Unemployment Compensation   | No  |
| Military and Veterans' Affairs  | Entitlement to paralyzed veterans' benefits   | Yes   |
| Probation and Parole  | Heart and Lung Act determinations   | Yes   |
| Public School Employees' Retirement System  | Pension forfeiture, contested beneficiaries, benefit adjustments, or entitlement to benefits  | Yes   |
| Pa Municipal Retirement System  | Pension forfeiture, contested beneficiaries, benefit adjustments, or entitlement to benefits  | Yes   |
| Public Welfare Bureau of Hearings and Appeals   | Licensure of childcare facilities   | No  |
| Revenue Board of Appeals  | Inheritance Tax matters   | No  |
| State Bureau of Professional and Occupational Affairs   | All licensing and continuing education for all licensing boards, notary issues, charitable trust issues   | Yes   |
| State Employees' Retirement System  | Pension forfeiture, contested beneficiaries, benefit adjustments, or entitlement to benefits,   | Yes   |
| State Police  | Heart and Lung Act benefits   | Yes   |
| Municipal Police Officers Training and Education Commission   | Training issues, certification of facility issues   | Yes   |
| Transportation  | Driver licensing matters, occupational driving licensing matters  | Yes   |
| <b>Source:</b> Compiled by Linda C. Barrett, Senior Deputy General Counsel, Office of General Counsel |   |   |

## **CHAPTER II**

# **DEVELOPMENT OF PROPOSED ADMINISTRATIVE PROCEDURE ACT**

The proposed Administrative Procedure Act (the APA), presented as Chapter V of this report, is mostly based on the adjudicative provisions of the Uniform Law Commission's proposed Model State Administrative Procedure Act (the Model Act).

Section 101 of the APA (corresponding to Article 1 of the Model Act) contains extensive definitions of key terms used in the APA. The most important of these is "administrative proceeding," because this term identifies the proceedings where the APA applies. This term requires a "contested case," which is defined to refer to the "opportunity to be heard." The right to the opportunity to be heard is provided under the Federal or Pennsylvania Constitution or under a Federal or state statute, not by the APA itself. Where these laws require an opportunity to be heard in Pennsylvania matters, the APA applies. This pair of definitions sets forth the circumstances where the subchapter 5A hearing procedures apply. Section 103 states the short title of the statute, the "Administrative Procedure Act."

Subchapter 5A of the APA (corresponding to Article 4 of the Model Act) contains provisions for administrative proceedings resulting in adjudications. Section 501 provides that subchapter 5A applies to any agency administrative proceeding. A presiding officer at an administrative proceeding may be either an ALJ, an agency head, or a board or commission (or any member thereof) that is designated by another statute to conduct administrative hearings (§ 502(a)). Any agency has three options regarding a particular case: It may handle the case itself, delegate all responsibility for the case to the Office of Administrative Hearings (OAH), or delegate to the OAH the responsibility for arriving at a recommended order while retaining final decision making authority.

Two kinds of orders are provided for in administrative proceedings, namely recommended and final orders (§ 509). Recommended orders are effective unless they are overturned by the agency head. Final orders are final within the administrative process and can be overturned only by the agency itself upon reconsideration or by judicial appeal. (The Model Act provides for a third category of orders termed "initial orders," but the drafters omitted this category because it was considered essentially the same as a recommended order.)

Subchapter 5A procedures are designed to be used by both agencies that use the central panel (governed by subchapter 6) and enforcement agencies that conduct their own contested case hearings under section 502(a). A key provision is section 507, which governs ex parte communications and also contains provisions that guarantee separation of functions. That section includes detailed rules barring communications between the agency head and agency staff or interested parties regarding administrative proceedings.

Subchapter 6 (corresponding to Article 6 of the Model Act) contains provisions governing the OAH. The establishment of a central administrative hearing agency represents an important change from the current law. The growth of central panel agencies in the states since the adoption of the 1981 Act has been significant, with many other states currently utilizing these agencies in some fashion.<sup>8</sup> In central panel agencies, the administrative law judges (ALJs) who preside over contested case hearings work for the central panel agency, not for the agency whose contested case is being adjudicated. This provides for a separation of the hearing and decision authority from the agency that has authority to enforce the law. Central panel agencies have independence from other executive branch agencies and can therefore provide for greater fairness in contested case hearings.

Subchapter 6 comprises the essential provisions needed to create a central panel agency. Central panel administrative law judges are the presiding officers in contested case proceedings governed by the provisions of subchapter 5A (§ 502(a)(1)), and those provisions govern procedures in contested cases heard by central panel ALJs. The Chief ALJ of the central panel agency may adopt procedural rules to govern contested case hearings (§ 604(a)(7)). The ALJ is directed to issue a final order in a contested case, if final order authority has been delegated to the central panel agency by the agency head, or issue a recommended order if such authority has been retained by the agency head (§ 603(f)). Subchapter 6 procedures apply when an opportunity for a hearing is required by federal or a state constitutional or statutory law. The APA does not otherwise attempt to prescribe the situations that give rise to the right to an administrative hearing.

Subchapter 7A (corresponding to Article 5 of the Model Act) contains provisions governing judicial review of final agency actions. The standing (§ 702) and scope of review (§ 704) sections are key provisions. In view of the broad scope of the judiciary's authority over judicial procedure as provided in Article V, section 10 of the Pennsylvania Constitution, this subchapter is drafted so as to defer to court rules more than the Model Act does.

Upon the advice of the Legislative Reference Bureau, the legislation is in the form of an amendment to the current Administrative Agency Law and therefore is included with provisions relating to administrative proceedings before local agencies.<sup>9</sup> The adjudicative provisions of the current Administrative Agency Law should be deleted by the legislation enacting the APA.<sup>10</sup>

## **Revised Model State Administrative Procedure Act**

The HR 247 working group turned for guidance to the Nation's most respected institution for the generating of proposals for legal reform at the state level: the Uniform Law Commission.<sup>11</sup> The ULC brings together outstanding legal minds from across the United States to draft legislation proposed for adoption by all the states. The ULC has been most effective at proposing statutes

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<sup>8</sup> See p. 39 for a discussion of central hearing panels in other states.

<sup>9</sup> The Administrative Agency Law comprises chapter 1, subchapter 5A, and subchapter 7A of Title 2 of the Pennsylvania Consolidated Statutes.

<sup>10</sup> As was done in 2013 Senate Bill 56 (P.N. 25).

<sup>11</sup> An Introduction to the Uniform Law Commission <http://uniformlaws.org/Video.aspx?title=>. The full name of the organization is the National Conference of Commissioners on Uniform State Laws.

where there is a felt need for a common body of law applying in all the states so that national enterprises are not hampered by 50 different sets of rules. The classic example—and the ULC’s greatest achievement to date—is the Uniform Commercial Code, which has been adopted in every state.<sup>12</sup> For other legal topics, the need for nationwide uniformity is less urgent, but it is felt that the best provisions should be collected in one Model Act to facilitate their consideration by the States. The Model State Administrative Procedure Act is one such proposal.

Pennsylvania participates in the ULC through its own nine-member Board of Commissioners of Uniform State Laws that participates under statutory authority in the ULC’s deliberations.<sup>13</sup> John L. Gedid and Raymond P. Pepe, two members of Pennsylvania’s delegation to the ULC, participated in the drafting of the Model Act and were members of the HR 247 working group. The ULC deliberations leading to the drafting of the Model Act took place over a period of seven years and culminated in its adoption by the ULC on October 15, 2010. As of this writing, the Model Act is under active consideration only in Pennsylvania.<sup>14</sup>

The Legislative Reference Bureau adapted Articles 1 (General Provisions), 4 (Adjudication in Contested Cases), 5 (Judicial Review), and 6 (Office of Administrative Hearings) of the Model Act into 2013 Senate Bill 56 (P.N.25), which served as the immediate starting point for the working group’s deliberations.<sup>15</sup> The working group did not consider rule making, which is currently under consideration as 2013 Senate Bill 99 (P.N. 366)). SB 99 codifies the current law on rulemaking, most of which is the Commonwealth Documents Law<sup>16</sup> and the Regulatory Review Act.<sup>17</sup> (Article 3 of the Model Act sets forth a rulemaking procedure that is similar in most respects to Pennsylvania’s. A notable difference is that the Model Act permits a person to petition an agency to adopt a rule, and if the agency denies the petition, the petitioner may bring an action in court to contest the denial on grounds of abuse of discretion.<sup>18</sup>)

The working group carefully considered the proposed Model Act and made innumerable changes to clarify and streamline its provisions and adapt them to Pennsylvania law and practice.

### ***History of the ULC Model State Administrative Procedure Act<sup>19</sup>***

The ULC has adopted four Model State Administrative Procedure Acts. The ULC’s proposed legislation on state administrative law has been in the form of model rather than uniform acts.

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<sup>12</sup> In Pennsylvania the UCC constitutes Title 13 of the Pennsylvania Consolidated Statutes.

<sup>13</sup> 1 Pa.C.S. Ch. 31.

<sup>14</sup> ULC, State Administrative Procedure Act, Revised Model [http://www.uniformlaws.org/Act.aspx?title=State Administrative Procedure Act, Revised Model](http://www.uniformlaws.org/Act.aspx?title=State%20Administrative%20Procedure%20Act) (visited March 18, 2014).

<sup>15</sup> Model Act Articles 2 (Public Access to Agency Law and Policy), 3 (Rulemaking; Procedural Requirements and Effectiveness of Rules), and 7 (Rules Review) are outside the scope of this study. Article 2 deals with the publication of administrative rules.

<sup>16</sup> 1968 Act No. 240, P.L.769.

<sup>17</sup> 1982 Act No. 181, P.L.633.

<sup>18</sup> Model Act, § 318.

<sup>19</sup> This section on the history of the ULC Model State APAs is based on the Prefatory Note to the *Revised Model State Administrative Procedure Act* (ULC, October 15, 2010), 1-6.

Acts are designated as “uniform” if (A) there is a substantial reason to anticipate enactment in a large number of jurisdictions; and (B) uniformity of the provisions of the proposed enactment among the various jurisdictions is a principal objective. Acts are designated as “model” if (A) uniformity may be a desirable objective, but not a principal objective; (B) the act may promote uniformity and minimize diversity, even though a significant number of jurisdictions may not adopt the act in its entirety; or (C) the purposes of the act can be substantially achieved, even though it is not adopted in its entirety by every State.<sup>20</sup>

### ***1946 Model State Administrative Procedure Act***

The ULC’s Model State APA has furnished guidance to the states since 1946, the date that the first version of the Act was proposed. The Federal Administrative Procedure Act was drafted at about the same time as the 1946 Act, and there was substantial communication between the drafters of the two acts.

The 1946 Act incorporated basic principles with only enough elaboration of detail to support essential features of an administrative procedure act. The drafters of the 1946 Act explained that a model act approach was required because details of administrative procedure must vary from state to state as a result of different general histories, different histories of legislative enactment, and different state constitutions. The drafters explained that the Act could only articulate general principles because agencies, even within a single state, perform widely different tasks, so that no single detailed procedure is adequate for all their needs; at the same time, the legislatures of *different* states have taken dissimilar approaches to virtually identical problems. By about 1960, twelve states had adopted the 1946 Act.

### ***1961 Model State Administrative Procedure Act***

As a result of several studies conducted in the 1950s, the ULC decided to revise the 1946 Act. The basis given for that decision was that a maturing of thought on administrative procedure had occurred since 1946. The drafters of the 1961 Act explained that their goals were “fairness to the parties involved and creation of procedure that is effective from the standpoint of government.” The 1961 Model State APA purposely included only “basic principles” and “essential major features.” Some of those major principles were: requiring agency rulemaking for procedural rules; rulemaking procedure that provided for notice, public input, and publication; judicial review of rules; guarantees of fundamental fairness in adjudications; and provision for judicial review of agency adjudications. Over one half of the states adopted the 1961 Act or large parts of it.

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<sup>20</sup> Raymond P. Pepe, “Should Pennsylvania Update the Administrative Agency Law by Adopting the Adjudicative Provisions of the Model State Administrative Procedures Act?” (October 6, 2011), 3, available at [http://www.klgates.com/files/Publication/23f0802b-afae-46a2-a8df-0fc933cfe2e9/Presentation/PublicationAttachment/cc21eded-8f7a-409b-8de0-4ba2a345c26d/article\\_Pepe\\_MSAPA\\_Analysis.pdf](http://www.klgates.com/files/Publication/23f0802b-afae-46a2-a8df-0fc933cfe2e9/Presentation/PublicationAttachment/cc21eded-8f7a-409b-8de0-4ba2a345c26d/article_Pepe_MSAPA_Analysis.pdf)

### ***1981 Model State Administrative Procedure Act***

In the 1970s, the ULC began work on another revision of the Act, which was completed in 1981. The ULC based the need for this revision on greater experience with administrative procedure by state governments, and growth in state government in such areas as the environment, workplace safety, and benefit programs. This growth, they argued, was so great as to change the very nature of state government.

As the preface to the 1981 Act explained, the ULC's approach to drafting changed from the 1946 and 1961 Acts. According to its drafters, the 1981 Act was entirely new, with more detail than earlier versions of the Act. The drafters explained that more detailed provisions were possible because of greater state experience with administrative procedure since 1961. The 1981 Act consisted of ninety-four sections. In the twenty odd years after the publication of the 1981 Act, Arizona, New Hampshire, and Washington adopted many of its provisions, and several other states drew some provisions from it.

### ***2010 Model State Administrative Procedure Act***

In 2003 the ULC decided to undertake a further revision of the Model State APA, 22 years after the prior proposal, culminating in ULC's adoption of the current Model Act in 2010. The drafters believed that by 2003 there had developed a body of legislative action, judicial opinion, and academic commentary explaining, interpreting, and critiquing the 1961 and 1981 Acts and the Federal Administrative Procedure Act that constituted a sufficient basis to propose useful changes to the 1981 Act. After the 1981 Act, state legislatures, dissatisfied with agency rulemaking and adjudication, enacted statutes that modified administrative adjudication procedure. The section on Administrative Law and Regulatory Practice of the American Bar Association undertook a major reexamination of the Federal Administrative Procedure Act and recommended revisions to some of its provisions; since some sections of the 1981 Act were similar to the Federal Act, the ABA study furnished useful comparisons. The drafters decided that the proposal must also address the emergence of the Internet, which did not exist in 1981. Since the 1981 Act, 27 states and the District of Columbia<sup>21</sup> adopted central panel administrative law judge provisions, and the experience in those states was used to improve the Model Act.

Like its predecessors, the 2010 Model Act recognizes variations among the states and is not a uniform act. A model act is needed because there are a variety of approaches used in the various states, and the drafting committee sought to draft provisions that represent the best practices in the states.

Under the 1981 Act, evidentiary hearings were required for an extremely wide range of disputes between citizens and the government. For example, under the 1981 Act, a hearing would be required for a state park ranger's refusal to issue a camping permit, even if the permit denial did not infringe upon other constitutionally or statutorily protected rights. A variety of other

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<sup>21</sup> State of Maryland, Office of Administrative Hearings, Homepage <http://www.oah.state.md.us/home.asp> (accessed April 8, 2014); *Ibid.*, Joint Report of the Maryland Office of Administrative Hearings and the State Advisory Council on Administrative Hearings (2004) Annual Report, 4.

generalized approaches have been taken in some states to require hearings whenever agency actions substantially and directly affect the property, privileges, or rights of parties or other persons affected by agency actions.

The 2010 Model Act is lengthier than the 1961 Act, but shorter, less detailed, and less comprehensive than the 1981 Act. It is designed to ensure fairness in administrative proceedings, increase public access to the law administered by agencies, and promote efficiency in agency proceedings by providing for extensive use of electronic technology by state governments. Consistent with both the 1961 and the 1981 Acts, the Model Act provides for a uniform minimum set of procedures to be followed by agencies subject to it. The Model Act creates only procedural rights and imposes only procedural duties. Throughout the Model Act there are provisions that refer generally to other state laws governing related topics; when specific state laws are inconsistent with the Model Act's provisions, the specific laws control.

### **The Model Act and the Proposed APA**

In the course of about 27 drafting sessions, the HR 247 working group carefully examined the provisions of the Model Act that pertain to adjudication procedure, establishment of the central hearing panel, and judicial review. Most of the procedural provisions of the APA are based on the Model Act. Like the Model Act, the APA proposes the establishment of a central Office of Administrative Hearings in place of the current system where each agency houses its own adjudicatory body. The right to a hearing is not defined by the APA but rather by the state and federal constitutions and by statutes other than the APA, usually the enabling statutes for the various agencies.

At the same time the APA differs from the Model Act in important respects. A number of sections were omitted because the group believes the area covered by the section is better left to regulation. The drafting committee elected to omit from the APA certain issues that were included in the Model Act because the committee believed they could be better addressed in regulations to be promulgated by the OAH. For this reason, the APA does not include the Model Act sections relating to intervention, subpoenas, discovery, and licensure (Model Act §§ 409, 410, 411, and 419, respectively). The Model Act provides for an initial order and decision, but the working group eliminated this concept because they concluded it duplicates the recommended order and decision. The chapter on judicial review was condensed in order to avoid conflict with the powers of the judiciary as defined by the Pennsylvania Constitution, particularly article V, section 10(c).

### **Recommendation**

The HR 247 working group recommends that the General Assembly reform Pennsylvania's Administrative Agency Law to adopt the approach embodied in the Model Act. Working group member Raymond P. Pepe ably articulated the argument for why this should be done:

It is a fundamental principle of due process that hearings should be conducted fairly and impartially. In administrative proceedings, however, officials often formally or informally share or cooperate in the conduct of policy making, investigations, informal decision making, and prosecutions. As a result, in agency proceedings the danger always exists that the same degree of fairness and impartiality will not be afforded parties as is provided by the existence of an independent judiciary. Because matters entrusted to agencies often have equal or greater impacts on rights, duties, and obligations of the public as those considered in judicial proceedings, it is critical that strict measures be taken to maintain fair implementation of the rule of law. On the other hand, because of the sheer volume of matters committed to agency discretion and the limited resources available to government, it is necessary to ensure that agency proceedings are conducted efficiently and expeditiously and with sufficient flexibility to take into consideration the varying nature of matters committed to agency discretion. The proposed Revised Administrative Agency Law attempts to carefully balance these competing objectives.

The amendments address all aspects of the adjudicative process and provide greater guidance regarding a wide range of matters addressed by the General Administrative Rules and individual current agency rules in a manner consistent with what are widely perceived to represent best agency practices.<sup>22</sup>

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<sup>22</sup> Pepe, "Should Pennsylvania Update?" 6. While the quoted comment specifically refers to SB 56, the same reasoning applies to the APA.



## CHAPTER III THE POLICY OF THE APA

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### Nature and Development of Administrative Law

The field of administrative law developed as a result of the increasing technological complexity of modern life. Beginning with the establishment of the Interstate Commerce Commission in 1887, both the federal and state level saw a proliferation of specialized executive agencies that were delegated broad powers to deal with their respective fields. Within these agencies there developed structure that replicated the familiar tripartite separation of powers characteristic of the government in general, namely executive, legislative, and judicial branches. The counterpart to the legislative branch is the function of developing and promulgating regulations. In the great majority of agencies, this function is carried out by the executive leadership of the agency, while some check is provided by a regulatory review agency, such as the Independent Regulatory Review Board in Pennsylvania. The agency's executive leadership is supplied by an official selected by the President or the Governor, either through a cabinet department or an independent agency that is not under the direct policy control of the executive. An alternative frequently used is a board or commission, with day-to-day administration delegated to an executive director.

Along with policy and the management of the programs administered by the agency, there is needed a function similar to the judiciary, tasked with fairly applying the statute and the regulations promulgated thereunder to particular persons in specific situations. Over time, there evolved an adjudicatory division within many agencies that is independent from the agency's executive, yet nevertheless staffed by employees of the agency. A number of states have chosen to separate the adjudicatory function from all the agencies by establishing a central hearing function as a separate entity.<sup>23</sup> As further elaborated in Chapter IV, the APA proposes to join the ranks of those states.

### Due Process Requirements

Adjudications by administrative agencies must be conducted in accordance with the Due Process Clause of the Fourteenth Amendment and the corresponding provisions of the Pennsylvania Constitution. In a classic article, Judge Henry J. Friendly listed the following elements as the basic elements of administrative due process.<sup>24</sup>

- An unbiased tribunal (§ 502(b), (c))
- Notice of the proposed action and the grounds asserted for it (§§ 503(b), 505(b))

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<sup>23</sup> Jim Rossi, "Final, but Often Fallible: Recognizing Problems with ALJ Finality," 56 *Administrative L. Rev.* 53 (2004), 58.

<sup>24</sup> Judge Henry J. Friendly, "'Some Kind of Hearing,'" 123 *Univ. of Pennsylvania L. Rev.* 1267 (1975), 1279-95. References to the pertinent sections of the APA are in parentheses.

- An opportunity to argue against a proposed action (§ 503(c), (d))
- The right to call witnesses (§ 503(d))
- The right to know the evidence against one (§§ 503(d), 505(b)(2))
- The right to have the decision based only on the evidence presented (§ 503(j))
- The right to be represented by counsel at the party’s own expense (§ 503(h))
- The making of a record (§ 503(i))
- Public attendance (§ 503(f), (g))
- Statement of reasons for decisions (503(j))
- Judicial review (§ 702)

Not all of these elements are necessary for every hearing, and the more serious or important the administrative action in question, the more of these elements may be required. “Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action.”<sup>25</sup> With all the varied areas of administrative law, from decisions regarding welfare benefits, public housing, driver’s licenses, liquor licenses, professional licenses, public school discipline, and other settings, “the problem is always the same—to devise procedures that are both fair and feasible.”<sup>26</sup> The APA is intended to give adjudicators more specific guidance than current law does and to provide a structure that is more practical than the one Pennsylvania currently labors under. The rights afforded by the APA should assure that the requirements of Due Process are amply satisfied in every case.

## **Issues Addressed in the APA**

### **Issues Identified in HR 247**

HR 247, the enabling resolution for this study, lists eight issues to be addressed in the recommendations.<sup>27</sup> The APA addresses these issues primarily by creating a chief administrative law judge and vesting him or her with the power and duty to manage them.

1. *Identification of uniform professional qualifications and standards of hearing officers.*<sup>28</sup> ALJs are required to be attorneys at law for at least five years, in good disciplinary standing and have substantial experience in administrative law (§ 603(b)). Similar requirements apply to the Chief ALJ (§ 602(b)).

2. *Identification of a centralized system for selection and oversight of hearing officers and administrative law judges.* The Chief ALJ is given the power to appoint the other ALJs (§ 603(a)(1)); to provide for their continuing legal education (§ 604(a)(6)); adopt a code of conduct for ALJs (§ 604(a)(7)(i)); monitor their work and discipline them for failure to meet applicable professional standards (§ 604(a)(10)).

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<sup>25</sup> *Ibid.*, 1278, quoting *Cafeteria & Restaurant Workers Local 476 v. McElroy*, 367 U.S. 886 (1961).

<sup>26</sup> “Some Kind of Hearing,” 1315.

<sup>27</sup> 2011 House Resolution No. 247 (P.N. 4136), page 2, lines 7-28.

<sup>28</sup> Parenthetical citations to the APA are included.

3. *Identification of need and assignment of responsibility based on subject matter specificity.* The proposed legislation empowers the Chief ALJ to “establish necessary classifications for case assignment on the basis of subject matter, expertise and case complexity” (§ 604(a)(11)).

4. *Separation of advocacy and adjudicatory roles within each agency.* In the course of drafting the Model Act, the ULC drafting committee discussed this problem exhaustively through its provision on ex parte communication (§ 507). The basic approach is to forbid certain communications unless the parties to the matter are given notice and an opportunity to participate. Extending this principle (with some exceptions) to agency staff will assure that there will not be an improper mixture of the quasi-prosecutorial and the decision-making functions. (Because this is a central consideration in assuring fairness in the administrative process and public confidence in the process, it will be considered in more detail below.)<sup>29</sup>

5. *Determination of the need to create a uniform and understandable docketing system.* The working group considers the establishment of a central docket to be a major advantage of a central panel system. The responsibility for creating and maintaining the docket is delegated to the Chief ALJ (§ 604(a)(16)).

6. *Identification of a centralized publicly accessible system to improve access to decisions and opinions.* The Office of Administrative Hearings (OAH) is directed to create a publicly available index of its final decisions. To maintain appropriate confidentiality, provisions are included for redaction and applications of the limitations of the Right-to-Know Law (§ 606).

7. *The need for consistent use of the rules of evidence.* Basic provisions regarding the use of evidence in administrative proceeding are included, including the following (§ 504):

- Technical rules of evidence do not apply.
- All “relevant evidence of reasonably probative value” is admissible.
- Hearsay evidence is admissible “if it is of a type commonly relied on by a reasonably prudent individual” in the conduct of his or her affairs, but if objected to, is not sufficient by itself to support a finding of fact.
- Findings of fact must be supported by some admissible evidence.<sup>30</sup>

8. *Identification of possible cost savings by eliminating duplication and redundancy and by enhancing ability to use resources to meet current needs.* While no cost saving estimates are available, there is a reasonable basis for believing that a central panel will allow for more efficient use of the pool of ALJs. Each ALJ can be expected to attain expertise in a few areas of law and can be shifted from one to another depending on demand. If each agency has its own pool, its ALJs may sit idle when there are few proceedings and then face an overwhelming crush of work when the number of adjudications in that area increases.

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<sup>29</sup> See p. 27 and p. 63, comment to APA § 507.

<sup>30</sup> See *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Commw. Ct. 1976); *Commonwealth, Unemployment Compensation Board of Review v. Ceja*, 427 A.2d 631 (Pa. 1981).

## **Other Issues**

1. *Disqualification of Hearing Officer.* The APA includes measures to assure that the presiding officer at a hearing will not have real or apparent bias (§ 502(b), (c)). An individual who has served as an investigator, prosecutor or advocate, or is under the authority of one who has, may not serve as an administrative decision maker. An individual may be disqualified for bias, prejudice, financial interest, violation of the rules relating to ex parte communications, or any other factor that might call his or her impartiality into question, and he or she is required to disclose to the parties any facts that may be relevant to disqualification. A party may petition the agency to have a potential decision maker disqualified, but the party must exercise due diligence in requesting disqualification. The potential decision maker decides whether to disqualify him- or herself, but must state the facts and reasons supporting the decision on whether or not to recuse.

2. *Electronic adjudications.* The APA allows the presiding officer to conduct prehearing conferences and hearings by telephone, television, video conference or other electronic means, but testimony may not be taken from witnesses who cannot be seen unless all parties consent and the hearing officer determines that such a procedure will not impair the reliability of credibility determinations. In hearings where electronic communications are used, a hearing must be open to the public unless the presiding officer determines there are grounds for closing it; the hearing is considered open if the public can view it where the presiding officer is located or can hear the proceeding as it occurs (§ 503 (e), (f), and (g)).

## **Ex Parte Communications and Separation of Functions**

Section 507 of the APA is a key provision that addresses two important problems in administrative procedure. The first of these is ex parte communications, which are communications with the decision maker concerning a case where all sides have not been given notice and an opportunity to be heard. The potential for unfairness is obvious where, for instance, the attorney for the agency presents evidence before the ALJ or discusses the case in a telephone conversation with him or her without anyone present to speak for the other party. The proposed legislation generally forbids ex parte communications with narrowly defined exceptions. These exceptions apply to communications with the decision maker that have the following characteristics:

1. Authorized by another statute
2. Relating to uncontested procedural matters
3. With an individual authorized by law to provide legal advice to him or her
4. With agency staff on ministerial matters (i.e., routine matters that require no discretion)
5. With agency staff on the scientific or technical basis of evidence, or scientific or technical terms
6. With agency staff on precedent, policy, or procedures of the agency

The second problem is the comingling of incompatible roles. The most judicial attention has been given to the mixing of the prosecutorial and the judicial role, as in *Lyness v. Commonwealth, State Board of Medicine*.<sup>31</sup> In that case, our Supreme Court mandated that these two roles be performed by separate entities within the agency. Section 507 mandates that exceptions 3, 4, 5, and 6 apply only if the person communicating with the decision maker “has not served as investigator, prosecutor, or advocate at any state of the case.” If the person has served in any of those capacities, ex parte communication with the decision maker is prohibited.

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<sup>31</sup> 605 A.2d 1204 (Pa. 1992).



## CHAPTER IV

# ESTABLISHMENT OF CENTRAL HEARING PANELS

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Besides fleshing out the procedural law relating to administrative agencies, the major change that would be effected by the APA is the establishment of a central hearing panel, to be known as the Office of Administrative Hearings (OAH), that would handle the bulk of the administrative adjudications within the government of the Commonwealth. The OAH is headed by the Chief ALJ, who oversees the assignment of ALJs to preside over the hearings. The administrative agency involved could decide either categorically or case by case whether the ALJ is vested with final decision making authority,<sup>32</sup> which means the power to render a decision that is final with respect to the agency. If the ALJ is not given final authority, the decision he or she renders after the hearing is a “recommended decision” that is submitted for review to the agency head. If the agency head approves the decision, it becomes the final decision. However, the agency head may reconsider the recommended decision and render a different final decision that overturns or modifies the ALJ’s decision. In cases where the ALJ is granted final authority, his or her decision is then the final decision of the agency. Whether the agency or the ALJ has final authority, a disappointed party may appeal a final decision to Commonwealth Court.<sup>33</sup>

### Advantages of Central Panels

The published commentators on administrative law are unanimously in favor of a central panel system opposed to a system like Pennsylvania’s where each agency has its own adjudicatory staff. The establishment of an OAH is likely to greatly assist the Commonwealth in dealing with the specific issues identified in HR 247. Instead of requiring each agency to deal with the issues separately for its own agency, the OAH could manage them for all agencies. For instance, the Chief ALJ is empowered to establish a central index of adjudications that will enable the public to look up the entries for all administrative agencies in one place (§ 606). The central panel helps focus the efforts of staff that now have different and perhaps conflicting roles.

Unlike decentralized Administrative Law Judges, housed in the agencies they serve, independent central panels are geared to one mission only—adjudication. In a nutshell, the only business of a central panel of Administrative Law Judges is to hear and decide cases—not to occasionally serve as house counsel for an agency or in other legal capacities. Not only do central panels have a vested interest in being efficient and cost effective, they must because they are under a microscope focused on adjudications—to the exclusion of other tasks.<sup>34</sup>

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<sup>32</sup> For convenience, “final decision making authority” will be referred to as “final authority.”

<sup>33</sup> 42 Pa.C.S. § 763(a)(1).

<sup>34</sup> Christopher B. McNeil, “Similarities and Differences between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudications under the Administrative Central Panel,” 18 *Jour. of the National Association of Administrative Law Judiciary* 1 (1998), 18.

The former Chief ALJ of the Pennsylvania Liquor Control Board argues that Pennsylvania would see many benefits by adopting a central ALJ panel:

Once established, a centralized panel structure will provide the Commonwealth with six very important benefits. First, a centralized system will guarantee, and be perceived by the public as guaranteeing, the impartiality of ALJs as fact-finders. Second, this system will improve the quality of hearings and decisions. Third, such a scheme will place the management and training of all ALJs in the hands of experienced officials whose understanding and appreciation of the duties and responsibilities of the office come from their actual performance of such duties and responsibilities. Fourth, many in-house staff and part-time outside personnel will no longer be required. Fifth, a reduction of overall costs will be realized. Sixth, an experienced, government-wide, politically insulated, career service would attract quality individuals.<sup>35</sup>

About 28 states use the central hearing agency model in some fashion.<sup>36</sup> *None of the states that has adopted a central panel has reverted to an agency-by-agency structure.*

A foundation has been laid in Pennsylvania for the implementation of a central panel system through the Hearing Officer Program under the Office of General Counsel. Under this program, agencies can voluntarily utilize a hearing officer from the program to conduct agency hearings in lieu of agency staff or outside persons. The program was initiated in 2003, and it has handled a total of 4,382 cases as of April 7, 2014.<sup>37</sup>

A major difference between the hearing officer program and the OAH under the APA is that use of the ALJs would be compulsory for all agencies covered by the APA, except in cases where the agency head is the presiding officer at the hearing. The OAH would become the only body to which adjudicative hearings could be referred and would therefore take the place of the hearing officers under the Department of State's Bureau of Professional and Occupational Affairs, the workers compensation judges, the unemployment compensation referees, and any other officials who currently render agency adjudications.

Under the APA, administrative proceedings are handled either by an agency head or by an ALJ and the hearings are held by a presiding officer, who may be either an ALJ, a member of a multimember board or commission, or an agency head. If the agency head presides over the hearing, he or she has final authority, and the decision can be countermanded only by the agency head upon reconsideration or by judicial review. The agency head can delegate final authority to the ALJ or may delegate responsibility for conducting the hearing and rendering a recommended decision and order, while retaining final authority, which may be exercised upon the agency's review of the ALJ's decision. Similarly, a multimember board or commission may designate one of its members to conduct a hearing as presiding officer, and may delegate or retain final authority. Under the APA, an agency may not delegate responsibility to preside over a hearing or to render a recommended or final decision to one of its own employees or to any person or body other than the OAH.

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<sup>35</sup> Ruth, 245.

<sup>36</sup> See p. 39 for a discussion of central hearing panels in other states.

<sup>37</sup> Material supplied to Commission staff by Linda C. Barrett, Senior Deputy General Counsel, Office of General Counsel, April 8, 2014. A description of the Hearing Officer Program is included in this report as Appendix C.

A contested case can thus follow one of three tracks: the agency may keep control of all stages of the case, in which case the agency head presides over the hearing and issues the final administrative decision. In the second track, the agency refers the initial determination to the ALJ, who is employed by the OAH; the ALJ then issues a recommended decision, which is reviewable by the agency head, who may accept, modify, or overrule it. Under the third track, the agency head authorizes the ALJ to render the final decision, thereby giving up the right to review it.

### **Cost Reduction and Efficiency**

Legal commentators claim that a central panel will cut costs and permit efficiencies that are out of reach of a diffuse adjudicatory system. Savings and efficiencies can be obtained by combining functions that are duplicated when each agency has its own adjudicatory staff.

Just as an automobile plant can produce 1000 cars more efficiently than one producing 100, a hearings unit issuing 1000 orders a month can do so more efficiently than one issuing 100. This is the result of shared resources: case management systems, operational staff, vehicles, office space, and so on. Moreover a large hearing unit has the capacity, simply by virtue of its size, to absorb a greater amount of additional work than does a smaller one.<sup>38</sup>

When the number of cases of a certain type fluctuates greatly in comparison with the total number of cases of that type, hearing officers may be idle. A centralized system allows better personnel management, as the Chief ALJ can assign ALJs to hearings dealing with different kinds of subjects, depending on the ALJ's expertise.<sup>39</sup> The resulting flexibility in case assignments bore fruit in reductions of redundant staff, monetary cost savings, or both, in Colorado, New Jersey, Texas, and Minnesota.<sup>40</sup>

An indication of the savings that may be anticipated by the institution of a central hearing panel is supplied by Oregon's experience with its OAH, which first showed a fiscal impact in FY 2000-01. There were cost reductions in hours per case referral (down 17 percent), cost per referral (down 11 percent), cost of Department of Transportation referrals (down six percent, saving \$37 million) and cost of Department of Human Services referrals (down 23 percent).<sup>41</sup>

### **Independence of the Adjudicator**

One of the basic issues in administrative law is arriving at a proper balance between executive control and quasi-judicial independence of the adjudicator. When the adjudicator is an employee of the agency, public confidence in the fairness and impartiality of the adjudicator may be undermined.

[There is an] unavoidable appearance of bias when an administrative law judge, attached to an agency, is presiding in litigation by that agency against a private party.

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<sup>38</sup> John Hardwicke and Thomas E. Ewing, "The Central Panel: A Response to Critics," 24 *Jour. of the National Association of Administrative Law Judiciary* 231 (2004), 233-34.

<sup>39</sup> *Ibid.*, 235.

<sup>40</sup> *Ibid.*, 236-37.

<sup>41</sup> *Ibid.*, 234.

One can fill the pages of the United States Code with legislation intended to guarantee the independence of the administrative law judge; but so long as that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as the judge's assignment to the case is by the very agency whose actions or contentions that judge is being called upon to review, it is extremely difficult, if not impossible, for that judge to convey the image of an impartial fact finder.<sup>42</sup>

One response to this problem has been a "Chinese wall" arrangement, whereby the agency employees who participate in the prosecution of a particular case are not permitted to play any role in the adjudication of that case. At least this degree of distance is required by the requirements of Due Process. In *Lyness v. Commonwealth, State Board of Medicine*,<sup>43</sup> the Supreme Court of Pennsylvania held that a separation of the prosecutorial and adjudicatory function within an administrative agency is required by the procedural provisions of the Pennsylvania Constitution, namely Article I, §§ 1, 9, and 11. While it is permissible for a single administrative agency to perform both the prosecutorial and adjudicatory function, due process requires that "walls of division be constructed which eliminate the threat or appearance of bias."<sup>44</sup>

However, the Chinese wall policy may not be wholly effective. "When [citizens] enter the hearing room and learn that the judge presiding over the case is an employee of their adversary, no explanation will persuade them, especially if they lose, that the outcome was not predetermined."<sup>45</sup> This impression has some foundation in reality:

There is abundant anecdotal evidence of agency hearing managers directing ALJs in individual cases to produce desired outcomes, irrespective of the facts and the law. In the personal experience of the authors, however, such blatant interference is not common. What is more common is indirect pressure, such as the desire of an ALJ to please a supervisor, to rise within the agency ranks or to remain friendly with agency staff who participated in the decision litigated at the hearing.

It can flow too from hearing managers seeing themselves as a part of, not separate from, the agency management structure.<sup>46</sup>

A central hearing panel that employs the adjudicators of all the agencies is a further step toward making the adjudicators like judges because the former are free from any control by any of the executive agencies that may appear before them as litigants. However, the adjudicators remain within the executive branch under the indirect control of the Governor and the direct supervision of the Chief ALJ (§§ 601(a), 602(a), 604(a)). Both the Chief ALJ and the other ALJs are protected from political

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<sup>42</sup> Larry J. Craddock, "Final Decision Authority and the Central Panel ALJ," 33 *Jour. of the National Association of Administrative Law Judiciary* 471 (2013), 489, quoting Bernard G. Segal, former president of the American Bar Association (ABA). Mr. Segal addressed federal agencies, but the analysis applies to state agencies as well.

<sup>43</sup> 605 A.2d 1204 (Pa. 1992).

<sup>44</sup> *Ibid.*, 1209.

<sup>45</sup> Hardwicke and Ewing, 232.

<sup>46</sup> *Ibid.*, 232, 233.

interference in that each is removable only for cause (§§ 602(c)(3), 603(a)(2)(ii)). The Chief ALJ serves for a fixed term of five years or until a successor is appointed (§ 602(c)(1)).

## **Final Decision Making Authority**

As has been mentioned, a related issue arising in states that have established central hearing panels is whether the final authority over adjudications at the administrative level should reside with the agency involved or with the ALJ. This issue has occasioned a lively debate among legal experts. The Model Act permits the agency head to reserve final decision making authority, subject only to judicial review, and the APA does likewise.<sup>47</sup> Some legal academics believe that the ALJ should have the final decision making authority in all cases.<sup>48</sup> The split over this issue has caused the National Association of Administrative Law Judiciary, the Central Panel Directors Conference, and the National Conference of the Administrative Law Judiciary<sup>49</sup> to oppose the Model Act on the ground that the Model Act does not provide an option giving final decision making authority to the central panel.<sup>50</sup> (The ULC often responds to controversial issues by drafting alternative provisions responsive to different views, but it chose not to do that for this issue.)

If we may venture to generalize, the choice for agency finality favors agency policy and technical expertise on the agency's subject matter, while ALJ finality favors fairness to individual claimants. We believe the Model Act approach is reasonable and that the burden of proof should fall on those advocating ALJ finality. It seems at odds with classic separation of powers doctrine to make fairness to individual claimants—important as that is—the highest priority of an executive agency. In those (hopefully rare) cases where these criteria conflict, the executive agency should give the highest priority to the effective and efficient administration of the agency's program. Sufficient fairness is reasonably assured by judicial review. Even advocates of ALJ finality do not question that agency finality subject to judicial review complies with Due Process.

### **Final Authority with the Agency**

Professor Jim Rossi of the Florida State University College of Law argues that agency finality maintains executive accountability and control over agency policy better than ALJ finality.

By leaving law and policy decisions in the hands of non-agency decision-makers, ALJ finality places at risk agency accountability. In the context of individual regulatory issues, however, legislatures generally delegate law and policy decisions to agencies, not to ALJs. Since most ALJs operate as merit employees—and are not subject to the same political accountability constraints as agency heads—the result of ALJ final order authority on issues of law and policy is less political accountability for agency decision-

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<sup>47</sup> Model Act, § 415; APA § 509(a), (c). The ALJ may issue the final order in cases where the agency head has delegated final decision making authority to him or her.

<sup>48</sup> Craddock, 484.

<sup>49</sup> The National Conference is affiliated with the ABA.

<sup>50</sup> Craddock, 475.

making. ALJ finality also values generalist decision making over expert decision making, and thus comes at some cost for expertise in agency decision-making.<sup>51</sup>

From an accountability perspective, allowing a central panel ALJ to trump the agency on [a policy] issue is problematic. Central panel ALJs often operate within the executive branch, but they are generally non-political. Unlike the agency, which has substantive regulatory jurisdiction, the central panel has not been delegated the authority to regulate in a specialized area. Agency heads, unlike most ALJs, are political appointees, accountable (through appointments and removal, as well as budgetary oversight) to the executive branch and—perhaps to a lesser, but no less important degree—the legislature (which writes and amends regulatory statutes). The political accountability of agency heads is important to ensuring the public legitimacy of agency action.<sup>52</sup>

Professor James F. Flanagan of the University of South Carolina School of Law agrees with Rossi that the agency should be able to review the decisions of the ALJ.

My view is that the agency should be the final decision maker. The legislature has delegated this authority to the agency which has the knowledge and expertise to properly conduct agency review of ALJ decisions. In addition, I believe that ALJ finality has significant disadvantages. In particular, it creates a loss of political accountability for the decisions reached through administrative adjudication, and also adversely affects the agency's ability to develop and implement a consistent regulatory scheme.<sup>53</sup>

### **Final Authority with the ALJ**

As has been mentioned, agency finality has been criticized on the grounds that the decision maker is employed by one of the parties to the dispute. An ALJ does not suffer from this drawback. The ALJ has final decision making authority in Florida, Louisiana, Missouri, and South Carolina.<sup>54</sup> (In Louisiana, an agency is precluded by statute from appealing an adverse ALJ ruling.<sup>55</sup>) California, Colorado, Maryland, Massachusetts, Minnesota, New Jersey, North Carolina, Tennessee, Washington, Wisconsin, and Wyoming provide for ALJ final authority for a limited number of agencies, but otherwise follow agency finality.<sup>56</sup>

For proponents of placing the final authority with the ALJ, such as Larry J. Craddock, former ALJ for the Texas Finance Commission, the paramount consideration is fairness to the individual litigant.<sup>57</sup> It follows that only the ALJ can properly act as the final decision maker in a contested case.

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<sup>51</sup> Rossi, 64.

<sup>52</sup> *Ibid.*, 71.

<sup>53</sup> James F. Flanagan, "An Update on Developments in Central Panels and ALJ Final Authority," 38 *Indiana L. Rev.* 401 (2005), 402.

<sup>54</sup> Rossi, 58.

<sup>55</sup> Ann Wise, "Louisiana's Division of Administrative Law: An Independent Administrative Hearings Tribunal," 30 *Jour. of the National Association of Administrative Law Judiciary* 95 (2010), 120.

<sup>56</sup> Rossi, 62. Note that this source was published in 2004.

<sup>57</sup> Craddock, 544.

The ALJ's proper role is as a neutral. It is to make certain both sides to the case receive a fair hearing, not to further the mission or policies of an administrative agency—except insofar as the agency proves those policies to have been properly promulgated—and to apply the properly promulgated agency policies and the law to the facts in the case before the ALJ. Stated another way, the ALJ's intended role is not to have either a pro- or anti-agency bias, but to confront every case with an open mind. The ALJ's role is to fully and fairly analyze the facts and legal arguments presented and to decide each case based on the record, according to the rule of law, to the best of the ALJ's ability.<sup>58</sup>

Proponents of ALJ finality argue that it can save costs by obviating the need for agency review, as the initial administrative determination can be challenged only in court.<sup>59</sup> Different ALJs may render inconsistent rulings, but potential disruption can be mitigated by providing for en banc review by a large group of ALJs or the entire panel.<sup>60</sup> There is a difference of opinion regarding whether under agency finality, agency heads abuse their review powers to reverse ALJ rulings favoring non-agency parties.<sup>61</sup>

Those who favor agency finality may view the pro-ALJ side as giving too much weight to individual fairness and independence of the adjudicator, while subordinating the agency's and the executive's ability to set its own policy and take responsibility for it.

[F]rom a political accountability perspective, ALJ final order authority is troublesome, especially where ALJs have the authority to decide issues of law and policy. By creating a central panel independent of the agency with regulatory jurisdiction, it splits the executive branch against itself under a guise of legitimacy. However, since independence is not the same as accountability, where issues of law and policy are at issue accountability may be sacrificed.<sup>62</sup>

Instead of two potentially competing centers of policy formulation, namely the agency and the courts on review, ALJ finality may create three by making the ALJ an independent policy maker. By judicializing executive agencies to this extent, ALJ final authority may be tinged with a "vision of the law that is totalizing, [and] relentless."<sup>63</sup>

### **Splitting the Difference**

The APA as presented in this report places final authority with the agency, while allowing the agency head to delegate it to the ALJ for certain cases or classes of cases. The General Assembly may wish to refine this choice further, and commentators have made several pertinent suggestions.

The statute could provide that the ALJ's decision is conclusive as to questions of fact but reviewable by the agency head as to questions of policy. The theory behind this position is that the

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<sup>58</sup> Ibid., 525.

<sup>59</sup> Ibid., 545.

<sup>60</sup> Craddock, 547.

<sup>61</sup> Ibid., 539-42; Flanagan, 419-22.

<sup>62</sup> Rossi, 66.

<sup>63</sup> Paul F. Campos, *Jurismania: The Madness of American Law* (Oxford University Press, 1998), 20.

adjudicator is in the best position to determine the credibility of the witnesses, while legal review permits the agency to retain control of its own policy.<sup>64</sup>

Another possibility is to mandate agency final authority for some agencies and ALJ final authority for others, as California and ten other states listed above have done.<sup>65</sup> The choice could depend on how stable policy is in the subject matter: an area where policy may shift with political control would be proper for agency finality, while one with little policy disagreement would favor ALJ finality. Another factor could be the relative availability of judicial review. For instance public utility rate regulation might be appropriate for agency final authority, because the loser can usually afford to pursue a judicial appeal. But for unemployment compensation the legislature might wish to provide for ALJ finality, because many claimants will be hard put to pay for an appeal. “The best cases for ALJ finality are those requiring determination of well-defined issues of historical fact (but not subject matter expertise), perhaps involving credibility determinations, where the ALJ applies (but does not make) established policies to those facts [*sic*].”<sup>66</sup>

If the ALJ is given final authority, the threat to the agency’s policy control can be mitigated by mandating that the agency must be given an opportunity to explain the policy to the ALJ. In the most important cases, the agency is represented by its most experienced and able staff attorney, and high level agency management is available to personally participate in the litigation. Agency management may testify regarding the policy or assist the attorney in presenting the agency’s policy and its application to the particular case. However, the final say at the agency level is with the ALJ.<sup>67</sup> In Texas, the agency’s power to vacate or modify the ALJ’s decision is strictly limited.

A state agency may change a finding of fact or conclusion of law made by an administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:

(1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;

(2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or

(3) that a technical error in a finding of fact should be changed.

The agency shall state in writing the specific reason and legal basis for a change made under this subsection.<sup>68</sup>

If an agency believes an ALJ ruling is detrimental to its policy position, the agency may propose a regulation to countermand or modify the ruling.<sup>69</sup> This response may entail a lengthy and cumbersome promulgation procedure, but it also enables public comment on what is likely a controversial issue.

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<sup>64</sup> Craddock, 480-482.

<sup>65</sup> See text at note 56.

<sup>66</sup> Flanagan, 432-33.

<sup>67</sup> Craddock, 533-37.

<sup>68</sup> Tex. Gov’t Code § 2001.058(e). Subsection (c) directs the agency to “provide the [ALJ] with a written statement of applicable rules or policies.” See Hoberg, “Administrative Hearings,” 89.

<sup>69</sup> Craddock, 546.

Finally, the statute can be drafted to direct the ALJ or the court on review to defer to the agency on policy issues. Professor Rossi proposes that a court reviewing an ALJ decision overturning an agency determination should nevertheless adopt the agency's statutory interpretations and analytical "frame of reference" rather than the ALJ's.<sup>70</sup> Not surprisingly, Craddock, an advocate for ALJ finality, finds this suggestion confusing and unworkable.<sup>71</sup>

## Central Hearing Panels in Other States

Staffing and time limitations did not permit us to delve as deeply as we would have liked into the issues relating to the establishment of central hearing panels. These include the scope of subject matter jurisdiction and decision making authority. Of critical importance is the financial structure of the office that will house the panel. To what extent will the office be supported by a direct appropriation, by fees to the agency or private claimants? How large should the initial appropriation be? How should the transition from the current system to the new one be handled, particularly with regard to the disposition of current employees?

Central panels exist in a variety of forms. In some states, almost all administrative hearings are handled by the central panel, while in other states the panel handles only certain types of cases for a more limited number of agencies. Some states provide that some agencies are required to use the central panel, other agencies are not permitted to use them, and a third category of agencies may refer some or all of their cases to the panel at the discretion of agency leadership. In at least one state, the central panel conducts the hearing and compiles the record for a decision by the agency, but in most states the central panel renders a decision that may or may not be subject to agency review. Some central panels comprise an administrative unit unto themselves, whereas others are under the umbrella of an agency or department, though independent from the larger unit.<sup>72</sup> Over time, there has been a tendency for the central panel to assume more and more responsibility.

Table 3 presents information on the central hearing panels of 28 states as indicated. Julian Mann III, who is among the leaders in the initiative to extend central panels throughout the Nation, lists the following 21 states as those that have adopted central hearing panels: Alaska, Arizona, California, Colorado, Florida, Georgia, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, North Dakota, Oregon, South Carolina, Tennessee, Texas Washington, and Wisconsin.<sup>73</sup> Similar hearing panels sit in Chicago, Cook County (Illinois), New York City, and Washington, D.C. The number of states identified depends on the breadth of jurisdiction the observer requires to consider a panel with jurisdiction over multiple agencies a "central" panel, since in a number of states an agency handles the hearings of some, but not all, adjudicative agencies. The listing in Table 3 is based on the self-description of the offices on their respective websites.

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<sup>70</sup> Rossi, 66-75.

<sup>71</sup> Craddock, 551-55.

<sup>72</sup> Allen Hoberg, "Administrative Hearings: State Central Panels in the 1990s," 46 *Administrative L. Rev.* 75 (1994), 78-81. Mr. Hoberg is the Director of the North Dakota OAH.

<sup>73</sup> E-mail from Julian Mann III to Commission staff, June 4, 2014.

**Table 3**  
**STATES WITH CENTRAL ALJ PANELS<sup>74</sup>**

| <b>States</b>     | <b>Statute Governing Administrative Procedure</b>                  | <b>Statute Establishing Panel</b>    | <b>Year Established</b> | <b>Final Decision Authority</b> | <b>Population<sup>75</sup> (millions)</b> | <b>Title and Department</b>  |
|-------------------|--|--------------------------------------|-------------------------|---------------------------------|---|--|
| <b>Alaska</b>     | Alaska Stat. 44.64.010 et seq.                                     | Alaska Stat. §44.64.010-44.64.055    | 2005                    | Agency                          | 0.7                                       | Office of Administrative Hearings, Department of Administration                |
| <b>Arizona</b>    | Ariz. Rev. Stat. §§ 41-1001–41-1066                                | Ariz. Rev. Stat. §41-1092-01         | 1999                    | Agency                          | 6.4                                       | Office of Administrative Hearings (executive branch, independent)              |
| <b>California</b> | Cal. Gov't Code §§ 11340– 11370.5                                  | Cal. Gov't Code §11370.3             | 1945                    | Mixed                           | 37.3                                      | Office of Administrative Hearings, Department of General Services              |
| <b>Colorado</b>   | Colo. Rev. Stat. §§ 24-4-105–24-4-107 and §§ 24-30-1001–24-30-1003 | Colo. Rev. Stat. §24-30-1001 et seq. | 1976                    | Mixed                           | 5.0                                       | Division of Administrative Hearings, Department of Personnel                   |
| <b>Florida</b>    | Fla. Stat. §§ 120.65–120.69  | Fla. State. §120.65                  | 1974                    | ALJ                             | 18.8                                      | Division of Administrative Hearings, Department of Management Services         |
| <b>Georgia</b>    | Ga. Code § 50-13-1 et seq.   | Ga. Code §50-13-40 et seq.           | 1994                    | Agency                          | 9.7                                       | Office of State Administrative Hearings  |
| <b>Hawaii</b>     | Haw. Rev. Stat. § 91-1 et seq.                                     |                                      | 1990                    | ALJ                             | 1.4                                       | Office of Administrative Hearings, Department of Commerce and Consumer Affairs |
| <b>Iowa</b>       | Iowa Code ch. 17A  | Iowa Code §10A.801                   | 1986                    | Agency                          | 3.0                                       | Administrative Hearings Division, Department of Inspections and Appeals        |
| <b>Kansas</b>     | Kan. Stat. § 77-501 et seq.  | Kan. Stat. §75-37,121 77-514, 77-561 | 1997                    | Agency                          | 2.9                                       | Office of Administrative Hearings, Department of Administration                |

<sup>74</sup> Jim Rossi, “Final, But Often Fallible: Recognizing Problems with ALJ Finality,” 56 *Administrative Law Review* 53, 57 (n. 6); “2013 Central Panel Directors and Chief ALJ’s Roster” (September 2013) e-mailed to Commission staff by the Maryland Office of Administrative Hearings, May 28, 2014. The Maryland chart also lists Chicago, the District of Columbia, and New York City as jurisdictions that utilize central hearing panels.

<sup>75</sup> 2010 Census. This column is included to help scale information from other states to Pennsylvania, whose population was 12.7 million in 2010.

**Table 3**  
**STATES WITH CENTRAL ALJ PANELS<sup>74</sup>**

| <b>States</b>         | <b>Statute Governing Administrative Procedure</b> | <b>Statute Establishing Panel</b> | <b>Year Established</b> | <b>Final Decision Authority</b> | <b>Population<sup>75</sup> (millions)</b> | <b>Title and Department</b>   |
|-----------------------|---|-----------------------------------|-------------------------|---------------------------------|---|---|
| <b>Louisiana</b>      | La. Rev. Stat. § 49:950-49:999.25                 | La. Rev. Stat. §49:991-49:997     | 1995                    | ALJ                             | 4.5                                       | Division of Administrative Hearings, Department of State Civil Service        |
| <b>Maryland</b>       | Md. Code, State Gov't § 10-201 et seq.            | Md. Code, State Gov't §10-205     | 1989                    | Agency                          | 5.8                                       | Office of Administrative Hearings, Executive Branch                           |
| <b>Massachusetts</b>  | Mass. Gen. Laws ch. 30A                           | Mass. Gen. Laws Ch. 7, §4H        | 1974                    | Agency                          | 6.5                                       | Division of Administrative Law Appeals, Office for Administration and Finance |
| <b>Michigan</b>       | Executive Order 2011-4                            | n/a                               | 2011                    | Mixed                           | 9.9                                       | Administrative Hearing System, Department of Licensing and Regulatory Affairs |
| <b>Minnesota</b>      | Minn. Stat. §§ 14.48-14.70                        | Minn. Stat §14.48                 | 1976                    | Agency                          | 5.3                                       | Office of Administrative Hearings, Executive Branch                           |
| <b>Missouri</b>       | Mo. Stat. ch. 621                                 | Mo. State. 621.015 -621.075§      | 1978                    | Mostly ALJ                      | 6.0                                       | Administrative Hearing Commission, Office of Administration                   |
| <b>New Jersey</b>     | N.J. Stat. ch. 52:14B                             | N.J. Stat. ch. 14F                | 1979                    | Agency                          | 8.8                                       | Office of Administrative Law, Department of State                             |
| <b>North Carolina</b> | N.C. Gen. Stat. §§ 150B-22 -150B-52               | N.C. Gen. Stat. §7A-750 et. seq.  | 1988                    | ALJ                             | 9.5                                       | Office of Administrative Hearings (independent quasi-judicial agency)         |
| <b>North Dakota</b>   | N.D. Cent. Code §§ 28-32-21 -28-32-52             | N.D. Cent. Code Ch. 54-57         | 1991                    | Agency                          | 0.7                                       | Office of Administrative Hearings   |
| <b>Oregon</b>         | Or. Rev. Stat. §§ 183.411 -183.502                | Or. Rev. Stat. §§183.605-183.690  | 2001                    | Agency                          | 3.8                                       | Office of Administrative Hearings, Employment Department                      |
| <b>South Carolina</b> | S.C. Code §§ 1-23-310 -1-23-400                   | S.C. Code §§1-23-500 -1-23-680    | 1994                    | ALJ                             | 4.6                                       | Administrative Law Court, Executive Branch                                    |
| <b>South Dakota</b>   | S.D. Codified Laws §§ 1-26-16 -1-26-37            | S.D. Codified Laws ch. 1-26D      | 2003                    | Agency                          | 0.8                                       | Office of Hearing Examiners, Bureau of Administration                         |
| <b>Tennessee</b>      | Tenn. Code § 4-5-301 et seq.                      | Tenn. Code §4-5-301               | 1974                    | Agency                          | 6.3                                       | Administrative Procedures Division, Secretary of State                        |

**Table 3**  
**STATES WITH CENTRAL ALJ PANELS<sup>74</sup>**

| <b>States</b>     | <b>Statute Governing Administrative Procedure</b>        | <b>Statute Establishing Panel</b>           | <b>Year Established</b> | <b>Final Decision Authority</b> | <b>Population<sup>75</sup> (millions)</b> | <b>Title and Department</b>                                    |
|-------------------|--|---|-------------------------|---------------------------------|---|--|
| <b>Texas</b>      | Tex. Gov't Code § 2001.001 et seq.                       | Tex. Gov't Code §2001.058                   | 1991                    | Agency                          | 25.1                                      | State Office of Administrative Hearings, Executive Branch      |
| <b>Virginia</b>   | Va. Code §§ 2.2-4020 -2.2-4030                           | Va. Code §2.2 - 4024                        | 2001                    | ALJ                             | 8.0                                       | Hearing officers, Supreme Court                                |
| <b>Washington</b> | Wash. Rev. Code § 34.05.410 et seq., § 34.05.510 et seq. | Wash. Rev. Code §34.12.010 et. seq.         | 1982                    | Agency                          | 6.7                                       | State Office of Administrative Hearings, Executive Branch      |
| <b>Wisconsin</b>  | Wis. Stat. §§ 227.40–227.60                              | Wis. Stat. §§227.43,15.103 (1), and 301.035 | 1983                    | Agency                          | 5.7                                       | Division of Hearings and Appeals, Department of Administration |
| <b>Wyoming</b>    | Wyo. Stat. § 16-3-107–16-3-115                           | Wyo. Stat. §9-2-2201 et. seq.               | 1992                    |                                 | 0.5                                       | Office of Administrative Hearings, Executive Branch            |

The heads of the existing central panels have developed a loose association called the Central Panel Directors Conference. The Conference is a loose association of the directors of state and city central adjudicative hearing offices to exchange ideas concerning the management of those offices. They have also been active in assisting states that are in the process of establishing such offices.

The directors of the central panel states and other advocates of central panel systems have worked hard to promote the passage of legislation establishing central panels by testifying at legislative hearings, providing useful information, and offering helpful advice to those seeking the establishment of central panels in other states. By association with, background work on behalf of, and direct participation in APA reform, uniform rule adoption, adoption of Codes of Ethics, Codes of Conduct, Disciplinary Rules, and the creation of new central panels, players in central panel systems and adjudication reform have shown that they are truly interested in achieving a structured responsible role for administrative adjudication in their states, not surprisingly, with the central panel as its core.<sup>76</sup>

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<sup>76</sup> Hoberg, “Administrative Hearings,” 92.

The current directory of the heads of the Conference is shown as Table 4.<sup>77</sup>

The Maryland OAH has been commended as a “Cadillac” among the central hearing offices in the U.S. and as an office that “has a strong history of involvement in central panel matters.”<sup>78</sup> It would seem to be a promising resource to help guide the process of establishing a similar office for the Commonwealth.

| STATE      | NAME               | TITLE                   | ADDRESS   | TELEPHONE    | E-MAIL                         |
|------------|--------------------|-------------------------|---|--------------|--------------------------------|
| Alaska     | Kathleen Frederick | Chief ALJ               | Office of Administrative Hearings, PO Box 110231 Juneau, AK 99811-0231                                      | 907-465-1886 | Kathleen.frederick@alaska.gov  |
| Arizona    | Cliff Vanell       | Director                | Office of Administrative Hearings 1400 West Washington, Suite 101 Phoenix, AZ 85233                         | 602-542-9830 | Cliff.vanell@azoah.com         |
| California | Linda Cabatic      | Director and Chief ALJ  | Office of Administrative Hearings, 2349 Gateway Oaks Dr, Suite 200 Sacramento, CA 95833                     | 916-263-0550 | Linda.cabatic@dgs.ca.gov       |
| Colorado   | Matt Azer          | Director and Chief ALJ  | Division of Administrative Courts, 633 17 <sup>th</sup> Street, Suite 1300, Denver, CO 80202                | 303-866-2000 | Matthew.azer@state.co.us       |
| Florida    | Bob Cohen          | Director and Chief ALJ  | Division of Administrative Hearings, 1230 Apalachee Parkway, Tallahassee, FL 32399                          | 850-488-9675 | Bob_cohen@doah.state.fl.us     |
| Georgia    | Maxx Wood          | Chief Judge             | Office of State Administrative Hearings, 230 Peachtree St NW, Suite 850, Atlanta, GA 30303                  | 404-651-7850 | mwood@osah.ga.gov              |
| Hawaii     | David Karlen       | Senior Hearings Officer | Office of Administrative Hearings, 335 Merchant St, Suite 100, Honolulu, HI 96813                           | 808-586-2828 | david.h.karlen@dcca.hawaii.gov |
| Iowa       | John Priestler     | Chief ALJ, Acting       | Division of Administrative Hearings, Wallace State Office Bldg, 3 <sup>rd</sup> Floor, Des Moines, IA 50319 | 515-281-6372 | john.priester@dia.iowa.gov     |
| Kansas     | Bob L. Corkins     | Director                | Office of Administrative Hearings, 1020 S Kansas Avenue, Topeka, KS 66612-1327                              | 785-291-3355 | n/a                            |

<sup>77</sup> Commission staff was contacted by Julian Mann III of the North Carolina Office of Administrative Hearings. He can be reached at Julian.mann@oah.nc.gov. The Pennsylvania Bureau of Hearings and Appeals of the Department of Public Welfare is included in the Central ALJ directory forwarded from the Maryland OAH. The Bureau is not, however, a central panel as commonly understood or as contemplated in the proposed APA, as its jurisdiction is limited to adjudications under the Public Welfare Code and certain cases related to the Department of Aging. The jurisdiction of the Bureau was defined for Commission staff by e-mail from Tracy Henry, Chief ALJ, DPW Board of Hearings and Appeals, June 13, 2014.

<sup>78</sup> Allen C. Hoberg, “Ten Years Later: The Progress of State Central Panels,” 21 *Jour. of the National Association of Administrative Law Judiciary* 235 (2001), 236-37.

<sup>79</sup> E-mail from Maryland Office of Administrative Hearings to Commission staff, May 28, 2014. The entries from cities and the Province of Quebec are omitted. The Pennsylvania Bureau of Hearings and Appeals is included in the Maryland directory but is omitted from this table for reasons stated in n. 76.

**Table 4**  
**CENTRAL PANEL DIRECTORS AND CHIEF ALJ ROSTER<sup>79</sup>**

| STATE          | NAME                     | TITLE                                   | ADDRESS  | TELEPHONE    | E-MAIL                                    |
|----------------|--------------------------|---|--|--------------|---|
| Louisiana      | Ann Wise                 | Director                                | Division of Administrative Law<br>PO Box 44033<br>Baton Rouge, LA 70804                                  | 225-342-1800 | awise<br>@adminlaw.state.la.us            |
| Maine          | Elizabeth Wyman          | Chief ALJ                               | Division of Administrative Hearings, 45 Commerce Drive<br>Augusta, ME 04333                              | 207-621-5001 | admin.hearing<br>@maine.gov               |
| Maryland       | Thomas E. Dewberry       | Chief ALJ                               | Office of Administrative Hearings, 11101 Gilroy Road<br>Hunt Valley, MD 21031                            | 410-229-4105 | tdewberry<br>@oah.state.md.us             |
| Massachusetts  | Richard Heidlage         | Chief Administrative Magistrate         | Division of Administrative Law Appeals, One Congress Street,<br>11 <sup>th</sup> Floor, Boston, MA 02114 | 617-727-7060 | Richard.c.heidlage<br>@state.ma.us        |
| Michigan       | Mike Zimmer              | Executive Director                      | Administrative Hearing System<br>611 W Ottawa Street, 4 <sup>th</sup> Floor<br>Lansing, MI 48909         | 517-373-2792 | zimmerm<br>@michigan.gov                  |
| Minnesota      | Tammy Pust               | Chief ALJ                               | Office of Administrative Hearings, 600 N Robert Street<br>St. Paul, MN 55101                             | 651-361-7830 | tammy.pust<br>@state.mn.us                |
| Missouri       | Sreenivasa Rao Dandamudi | Presiding Commissioner                  | Administrative Hearings Commission, 301 W High Street, Jefferson City,<br>MO 65102                       | 573-751-2422 | n/a                                       |
| New Jersey     | Laura Sanders            | Chief ALJ and Acting Director           | Office of Administrative Law<br>9 Quakerbridge Plaza<br>Trenton, NJ 08625                                | 609-689-4001 | Laura.sanders<br>@oal.state.nj.us         |
| North Carolina | Julian Mann              | Chief ALJ                               | Office of Administrative Hearings, 1711 New Hope Church Road<br>Raleigh, NC 27609                        | 919-431-3019 | Julian.mann<br>@oah.nc.gov                |
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# CHAPTER V

## ADMINISTRATIVE PROCEDURE ACT

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This chapter sets forth the HR 247 study's draft of the proposed Administrative Procedure Act, with source notes and comments.

### PENNSYLVANIA CONSOLIDATED STATUTES TITLE 2. ADMINISTRATIVE LAW AND PROCEDURE

#### CHAPTER 1 General Provisions

##### § 101. Definitions.

Subject to additional definitions contained in subsequent provisions of this title which are applicable to specific definitions of this title, the following words and phrases, when used in this title, shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

**“Adjudication.”** Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made. The term does not include any order [based upon a proceeding before a court or] which involves the seizure or forfeiture of property, paroles, pardons or releases from mental institutions.

**Source:** 2 Pa.C.S. § 101.

**Comment:** This definition refers to the result of an administrative proceeding, not to the proceeding itself.

**“Adjudicative body.”** A Commonwealth agency comprised of a board or commission which is authorized by law to conduct a hearing and issue an adjudication.

**Source:** New.

**“Administrative appeal.”** An appeal from a subordinate officer to an agency head or adjudicative board or commission.

**Source:** New

**Comment:** “Administrative proceeding” includes this term.

**“Administrative law judge.”** An individual appointed under section 603(a) (relating to administrative law judges).

**Source:** New.

**Comment:** Section 603 sets forth the law dealing with the appointment, qualifications, and powers and duties of the administrative law judge.

**“Administrative proceeding.”** Any proceeding other than a judicial proceeding, the outcome of which is required to be based on a record or documentation prescribed by law or in which law or regulation is [particularized in application to individuals] applied to a party in a contested case. The term includes an administrative appeal.

**Source:** 2 Pa.C.S. § 101.

**Comment:** This definition is modified from the source, and it is a key term in delineating the scope of the APA. As it encompasses any nonjudicial proceeding, the term can refer to proceedings before local agencies.

**“Agency.”** A government agency.

**Source:** 2 Pa.C.S. § 101.

**“Agency action.”** Any of the following:

- (1) An order.
- (2) The failure to issue an order within a time required by a statute other than this title or within a reasonable time.

**Source:** New. Adopting section 102(4) of the Model Act.

**Comment:** The term includes “order” as defined in this section. Failure to issue an order or perform a duty or any other function that may be required by law is not judicially reviewable except through mandamus.

**“Agency head.”** The individual in whom, or one or more members of the body of individuals in which, the ultimate legal authority of an agency is vested.

**Source:** New. Adopting section 102(5) of the Model Act.

**Comment:** The purpose of the definition is to differentiate between the agency as an organic whole and the particular person (single agency head) or persons (commissioners or board members) in whom the final decisional authority of the agency is vested. The term “agency head” is also used to differentiate between agency employees other than the agency head who may be delegated the responsibility to carry out functions under the APA from the agency head who has the legal authority to carry out those functions.

**“Appeal.”** Includes proceedings on petition for review.

**Source:** 2 Pa.C.S. § 101.

**“Commonwealth agency.”** Any executive agency or independent agency.

**Source:** 2 Pa.C.S. § 101.

**Comment:** The APA deals primarily with administrative proceedings before Commonwealth agencies, which are comprised of executive and independent agencies. See § 501(a).

**“Contested case.”** An administrative proceeding in which an opportunity to be heard is required by law.

**Source:** New. Adopting section 102(7) of the Model Act.

**Comment:** The Model Act definition reads “an adjudication in which an opportunity for an evidentiary hearing is required by the federal constitution, a federal statute, or the constitution or a statute of this state.” The specification of these sources of law is condensed to “by law.”

The APA looks to external sources such as statutes and constitutions to determine when a party is entitled to an evidentiary hearing. This term also includes evidentiary hearings required by the Federal or Pennsylvania Constitution. This subchapter provides for the type of evidentiary hearing to be held in a case where constitution or statute creates the right to an evidentiary hearing. Including constitutionally created rights to an evidentiary hearing within the provisions of the APA eliminates the problem of looking outside it to determine the type of evidentiary hearing required in cases where the right to the evidentiary hearing is created by a constitution. Evidentiary hearing rights created by judicial decisions are defined by constitutional decisions by courts in that state. See *Goldberg v. Kelly*, 397 U.S. 254 (1970). Subchapter 5A procedures apply to adjudications that are “contested cases” and that result in a “final order” of the agency and do not apply to informal adjudications that are not contested cases (i.e., where an opportunity to be heard is not required by law).

**“Final decision maker.”** The person with the power to issue an adjudication.

**Source:** New.

**“Final order.”** The order issued:

- (1) by the agency head sitting as the presiding officer in a contested case;
- (2) following the agency head review of a recommended order; or
- (3) by the presiding officer when the presiding officer has been delegated final decisional authority with no subsequent agency head review.

**Source:** New.

**Comment:** This definition is adopted from section 102(12) of the Model Act. It refers to an order in an administrative proceeding that is final within the administrative process and can be challenged only by a judicial appeal unless reconsideration is granted under section 510. See section 509 for provisions related to final orders.

**“Government agency.”** Any Commonwealth agency or any political subdivision or municipal or other local authority, or any officer or agency of any such political subdivision or local authority.

**Source:** 2 Pa.C.S. § 101.

**“Government unit.”** The General Assembly and its officers and agencies, any government agency or any court or other officer or agency of the unified judicial system.

**Source:** 2 Pa.C.S. § 101.

**Comment:** This definition is included to make the entities referred to in this definition “persons” within the meaning of the APA.

**“Hearing.”** An administrative proceeding on issues in which a decision of the presiding officer may be made in a contested case.

**Source:** New.

**“Index.”** A searchable list of adjudications maintained by an agency of the office under section 606 (relating to index of adjudications).

**Source:** New.

**“Judicial proceeding.”** An "action," "appeal" or "proceeding" in any "court" of this Commonwealth as those terms are defined in 42 Pa.C.S. § 102 (relating to definitions).

**Source:** 2 Pa.C.S. § 101.

**“Matter.”** Action, proceeding or appeal.

**Source:** 2 Pa.C.S. § 101.

**“Office.”** The Office of Administrative Hearings established in section 601 (relating to establishment and function).

**Source:** New.

**“Party.”** Any person [who] that appears in a proceeding [before an agency who] and has a direct interest in the subject matter of [such proceeding] an agency action.

**Source:** 2 Pa.C.S. § 101.

**Comment:** This definition has been editorially revised from current law without any intended change in substance.

**“Person.”** Includes a government unit [or an agency of the Federal Government].

**Source:** 2 Pa.C.S. § 101.

**Comment:** This definition should be read together with the definition of “person” in 1 Pa.C.S. § 1991.

**“Presiding officer.”** An individual [appointed by an agency to preside] who presides at an administrative proceeding.

**Source:** 2 Pa. C. S. § 101.

**Comment:** The definition under current law is revised to dovetail with the definition of “administrative proceeding.” The powers of the presiding officer are set forth in section 502(h).

**“Proceeding.”** A formal or informal agency process commenced or conducted by an agency.

**Source:** New. Adopting section 102(27) of the Model Act.

**“Recommended order.”** An order which:

- (1) is issued by a presiding officer without final decisional authority; and
- (2) is subject to review by the agency head.

**Source:** New. Adopting section 102(28) of the Model Act.

**Comment:** A recommended order is alternative to a “final order.” This definition relates directly to section 509.

**“Witness.”** A person who testifies in a proceeding before an agency.

**Source:** 2 Pa.C.S. § 101.

*Because the proposed legislation is drafted as an amendment to the current Administrative Agency Law rather than as free-standing legislation, the legislation enacting the APA will carry over the following terms and definitions from current law that do not substantively apply to the APA and are therefore omitted here: certified interpreter, Commonwealth government, Court Administrator of Pennsylvania, deaf, Department, executive agency, general rule, independent agency, interpret, interpreter, limited ability to speak or understand English, local agency, otherwise qualified interpreter, person who is deaf, person with limited English proficiency, and transliteration.*

**§ 102. Implementing regulations.** [Omitted.]

**§ 103. [Administrative Agency Law.] Administrative Procedure Act.**

**(a) General rule.**--The provisions of Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies) and Subchapter A of Chapter 7 (relating to judicial review of Commonwealth agency action) shall be known and may be cited as the [“Administrative Agency Law.”] Administrative Procedure Act.

**Source:** 2 Pa.C.S. § 101.

**Comment:** This section provides the short title for the legislation.

**§ 104 Commonwealth Documents Law (Reserved).**

**§ 105 Local Agency Law.** [Omitted.]

**§ 106. Effect of future legislation.** [Omitted.]

**CHAPTER 5**  
Practice and Procedure

**Subchapter A**  
Practice and Procedure of Commonwealth Agencies

**§ 501. Scope of subchapter.**

(a) **Eligibility.**--This subchapter applies to an administrative proceeding by a Commonwealth agency.

(b) **Notice and hearing.**--No adjudication of a Commonwealth agency shall be valid as to any person unless the person has been afforded reasonable notice of a hearing and an opportunity to be heard under this subchapter.

(c) **Exceptions.**--This subchapter does not apply to any of the following:

(1) Proceedings before the Department of Transportation involving matters reviewable under 42 Pa.C.S. § 933 (relating to appeals from government agencies).

(2) Proceedings before the State System of Higher Education involving student discipline.

**Source:**

*Subsection (a)*—2 Pa.C.S. § 501(a).

*Subsection (b)*—2 Pa.C.S. § 504.

*Subsection (c)*—2 Pa.C.S. § 501(b).

**§502. Presiding officer.**

(a) **Eligibility.**--A presiding officer must be one of the following:

(1) An administrative law judge.

(2) An agency head.

(3) One or more members of an adjudicative body.

(b) **Prior involvement.**--

(1) This subsection applies to an individual who:

(i) at any stage in a matter subject to an adjudication, has served as investigator, prosecutor or advocate; or

(ii) is subject to the authority, direction or discretion of an individual identified in subparagraph (i).

(2) Except as set forth in paragraph (3), an individual under paragraph (1) may not serve as the presiding officer in an administrative proceeding related to the matter.

(3) An agency head who has participated in a determination of probable cause or other preliminary determination in an administrative proceeding may serve as presiding officer or final decision maker in the administrative proceeding unless a party demonstrates grounds for disqualification under subsection (c).

**(c) Disqualification.--**

(1) Except as set forth in subsection (g), a presiding officer or agency head is subject to disqualification for:

- (i) bias;
- (ii) prejudice;
- (iii) financial interest;
- (iv) violation of section 507 (relating to ex parte communications); or
- (v) any other factor which would cause a reasonable person to question the impartiality of the presiding officer or agency head.

(2) A presiding officer or agency head, after making a reasonable inquiry, shall disclose to the parties any known facts related to grounds for disqualification which are material to the impartiality of the presiding officer or agency head in the proceeding.

**(d) Petition for disqualification.--**

(1) A party must petition for disqualification of a presiding officer or an agency head upon:

- (i) notice that the individual will preside; or
- (ii) discovering facts establishing a ground for disqualification.

(2) The petition must state with particularity the grounds on which it is claimed that a fair and impartial hearing cannot be accorded or the applicable rule or canon of practice or ethics that requires disqualification.

(3) The petition may be denied if the party fails to exercise due diligence in requesting disqualification after discovering a ground for disqualification.

**(e) Decision on disqualification.—**A presiding officer or an agency head whose disqualification is requested shall decide whether to grant the petition and state in a record facts and reasons for the decision. The decision to deny disqualification is not subject to interlocutory judicial review.

**(f) Substitute presiding officer.—**

(1) If a presiding officer is disqualified or becomes unavailable, a substitute presiding officer shall be appointed as required by law or, if no law governs, by:

- (2) the Governor if the original presiding officer is an elected official; or
- (3) the appointing authority if the original presiding officer is an appointed official.

**(g) Participation of agency head.—**If participation of the agency head is necessary to enable the agency to take action, the agency head may continue to participate notwithstanding a ground for disqualification or exclusion.

**(h) Powers.—**A presiding officer may do all of the following:

- (1) Regulate the course of hearings, including:
  - (i) the scheduling of hearings;
  - (ii) the recessing, reconvening and adjournment of hearings; and
  - (iii) the conduct of parties, attorneys, witnesses and others, in attendance at a hearing.

- (2) Administer oaths and affirmations.
- (3) Issue subpoenas for witnesses and documents at hearings or in discovery.
- (4) Rule upon offers of proof and to receive evidence.
- (5) Take or cause depositions to be taken.
- (6) Hold appropriate conferences before or during hearings.
- (7) Dispose of procedural matters and motions.
- (8) If the presiding officer is not the agency head:
  - (i) certify a question to the agency head for consideration and disposition; and
  - (ii) submit final or recommended decisions under section 509(a)(relating to decisions and orders).
- (9) Impose sanctions for:
  - (i) misconduct at the hearing; or
  - (ii) a violation of procedural orders, including subpoenas and orders for depositions and discovery.
- (10) Take other action necessary or appropriate to the discharge of the duties vested in a presiding officer, consistent with the law under which the agency functions.

**(i) Delegation.--**

- (1) An agency head or adjudicative body may delegate the function of a presiding officer to an administrative law judge.
- (2) The delegation shall specify whether the administrative law judge is authorized to issue a recommended or a final order.
- (3) The administrative law judge may not exercise any authority required by law to be performed by the agency head or adjudicative body.

**Source:**

*Subsection (a)-(g)*—New. Adopting from section 402 of the Model Act.

*Subsection (h)*—New. Derived from 1 Pa. Code § 35.187.

*Subsection (i)*—New.

**Comment:**

*Subsection (a)*—Paragraph (3) refers to bodies like the Environmental Hearing Board.

*Subsection (g)*—This subsection adopts the rule of necessity for agency decision makers. See *United States v. Will*, 449 U.S. 200 (1980) (common law rule of necessity applied to U.S. Supreme Court to decide issues before the Court relating to compensation of all Article III judges).

*Subsection (i)*—This subsection authorizes an agency head to delegate authority to a person not employed by the agency head’s office, thereby broadening the authority under section 73 of the Administrative Code of 1929 (No.175, (P.L.177)). The communication delegating the authority must state the scope of the ALJ’s authority in the particular case. In this manner, the ALJ may be granted final authority or only the authority to issue a recommended order that does not become final unless it is approved by the agency head.

**§ 503. Procedure.**

**(a) Scope of section.**--This section does not apply to an administrative proceeding under section 506 (relating to emergency adjudication procedure).

**(b) Notice.**--

(1) An agency shall give notice to a person of any agency action as to which the person has a right to a hearing.

(2) The notice must:

(i) be in writing;

(ii) set forth the agency action; and

(iii) inform the person of the right, procedure and time limit to file a pleading.

**(c) Authority of presiding officer.**--

(1) The presiding officer shall give all parties a timely opportunity to present pleadings, motions and objections.

(2) The presiding officer may give all parties the opportunity to file:

(i) briefs;

(ii) proposed findings of fact and conclusions of law; and

(iii) proposed recommended orders and final orders.

(3) The presiding officer, with the consent of all parties, may refer the parties in an adjudication to mediation or other dispute resolution procedure.

**(d) Duty of presiding officer.**--To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall give all parties the opportunity to present the party's case, including all of the following:

(1) Filing documents.

(2) Presenting evidence and argument.

(3) Examining and cross examining witnesses.

**(e) Conduct of hearing.**--Except as otherwise provided by law other than this title:

(1) Subject to paragraph (2), the presiding officer may conduct all or part of an evidentiary hearing or a prehearing conference by telephone, television, video conference or other electronic means.

(2) The hearing may be conducted by telephone or other method by which witnesses may not be seen only if:

(i) all parties consent; or

(ii) if directed by the presiding officer. The presiding officer must consider whether the method will impair the reliability of the determinations of credibility.

(3) Each party shall be given an opportunity to attend, hear and be heard at the proceeding as it occurs.

**(f) Open to public.**--Except as otherwise provided in subsection (g), a hearing shall be open to the public. A hearing conducted by telephone, television, video conference or other electronic means is open to the public if members of the public have an opportunity to attend the hearing at the place where the presiding officer is located or to hear the proceeding as it occurs.

**(g) Closed to public.**--The presiding officer may close a hearing to the public:

(1) on a ground on which a court could close a judicial proceeding to the public;

or

(2) under a statute other than this title.

**(h) Representation.--**

- (1) A party may be represented by an attorney at law at the party's expense.
- (2) A party may be advised or accompanied by an individual who is not an attorney at law.

**(i) Hearing record.--**

(1) The presiding officer shall ensure that a hearing record is established. The hearing record must contain all of the following:

- (i) A recording of the administrative proceeding.
  - (ii) Notice of the administrative proceeding.
  - (iii) A prehearing order.
  - (iv) Any motion, pleading, brief, petition, request and intermediate ruling.
  - (v) Evidence admitted.
  - (vi) A statement of matters officially noticed under section 504(b)(9) (relating to evidence).
  - (vii) An offer of proof under section 504(b)(4).
  - (viii) Any proposed finding, requested order and exception.
  - (ix) A transcript under paragraph (2).
  - (x) Any recommended order, final order and order on reconsideration.
  - (xi) A matter under section 507(g) or (h) (relating to ex parte communications).
- (2) An agency may prepare a transcript of the administrative proceeding.
- (3) The agency must maintain the hearing record as part of the agency's record.

**(k) Basis of decision.--**

(1) An adjudication must be based on the hearing record and contain a statement of the factual and legal bases of the decision. This paragraph requires:

- (i) Separately enumerated findings of fact, with citations to the hearing record, and the factors considered in evaluating evidence as set forth in section 504(b)(11). If a finding of fact is set forth in language of a statute other than this title, it must be accompanied by an explicit statement of the underlying facts supporting the finding of fact.
- (ii) Legal analysis, with citation to applicable legal authority.
- (iii) Separately enumerated conclusions of law.
- (iv) An order.

(2) The adjudication:

- (i) shall be issued in writing; and
- (ii) if a party consents, may be issued electronically to the party.

**(l) Protection of party rights.--**Regulations promulgated by a Commonwealth agency or the chief administrative law judge to implement this subchapter may include provisions more protective than the requirements of this section of the rights of parties other than the agency.

**(m) Case disposition.--**Unless prohibited by statute other than this title, a presiding officer may dispose of an administrative proceeding without a hearing by:

- (1) stipulation;
- (2) agreed settlement or consent order;
- (3) default;
- (4) withdrawal; or
- (5) dismissal or summary relief.

**Source:** New. Adopting section 403 of the Model Act.

**Comment:** This section specifies the minimum hearing procedure requirements that must be met in adjudicative proceedings under the APA. This section applies to all agencies whether or not an agency rule provides for a different procedure; this procedure is excused only if a statute expressly provides otherwise. This section does not supersede conflicting state or federal statutes. There are several interrelated purposes for this provision:

1) to create a minimum fair hearing procedure; and

2) to attempt to make that minimum procedure applicable to all agencies. In many states, individual agencies have lobbied the legislature to remove various requirements of the state Administrative Procedure Act from them. The result in a considerable number of states is a multitude of divergent agency procedures. This lack of procedural uniformity creates problems for litigants, the bar, and the reviewing courts. This section attempts to protect the due process rights of Pennsylvania citizens by providing a minimum, universally applicable procedure in all disputed cases. The procedures required here apply only to actions that fit the definition of a contested case and fall within section 501. The ULC claims that for this reason, they do not spread quasi-judicial procedures widely and should not create any significant agency loss of efficiency or cost increases. This Act continues current policy in giving presiding officers broad discretion with regard to discovery, pretrial conferences, and other matters relating to the conduct of hearings. See 1 Pa. Code § 35.187. The chief administrative law judge is authorized under § 604(a)(7)(ii) to make rules in this area with regard to hearings handled by administrative law judges.

*Subsection (a)*—This subsection excludes emergency adjudications from the requirements of this section. Section 506 provides for the procedures applicable to emergency adjudications.

*Subsection (b)*—This subsection requires, among other things, that the agency inform the affected person of the right, procedure and time limit to file a pleading with the agency. The Model Act proposes to further require the agency to make available to the person a copy of the agency procedures governing the case. The drafting committee rejected that requirement, preferring to leave the manner of notice to the agency or the OAH.

*Subsection (c)(3)*—This paragraph authorizes the use of mediation and other alternative dispute resolution procedures to resolve or settle contested cases. The use of such procedures has become widespread not only in civil litigation but also in administrative adjudication. See the Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–583.

*Subsection (d)*—The requirement of “full disclosure of all relevant facts and issues” is significantly broader than current law, which requires that all parties be “afforded opportunity to submit briefs prior to adjudication” and permits the agency to hear “oral argument upon substantial issues.” See 2 Pa.C.S. § 506.

*Subsection (e)*—This subsection permits hearings in contested cases to be conducted using telephone, television, video conferences, or other electronic means. To deal with concerns that due process of law may require live in person hearings when there are disputed issues of material fact that require the fact finder to make credibility determinations, electronic hearing procedures are permitted only if all parties consent or the presiding officer finds that an electronic hearing “will not impair reliable determination of the credibility of the testimony.” Telephone hearings are widely used in high volume short hearing dockets such as unemployment compensation hearings.

*Subsection (g)*—It is the duty of administrative boards to hold open hearings. *Byers v. Pennsylvania Public Utility Commission*, 109 A.2d 232 (Pa. Super. Ct. 1954). The exclusion from an administrative hearing of observers whose presence is intimidating or discomforting to a party

and who have no interest in the proceeding is within the discretion of the referee or tribunal. *Carr v. Commonwealth, State Board of Pharmacy*, 409 A.2d 941 (Pa. Commw. Ct. 1980).

*Subsection (h)*—This subsection does not expressly confer a right to self-representation in contested cases. The absence of such a provision reflects a belief that a broad right of self-representation is inappropriate for an APA that will apply globally to all contested cases, ranging from the simplest proceedings to very complex cases.

*Subsection (i)*—While paragraph (2) permits a party to be advised or accompanied by a nonlawyer, it should not be construed to permit the unauthorized practice of law. See 42 Pa.C.S. § 2524 (penalty for unauthorized practice of law).

*Subsection (j)*—Paragraph (1)(i) provides that the finding of fact is insufficient if it does not more than recite the statutory language of a required finding. The finding must set forth its basis in terms specific to the evidence in the case.

*Subsection (k)*—This subsection permits an agency to adopt procedural rules that are more protective than this section of the rights of parties other than the agency. Paragraph (2) refers to the General Rules of Administrative Practice and Procedure (GRAPP).

#### **§ 504. Evidence.**

**(a) Rules.**--In an administrative proceeding:

- (1) the Pennsylvania Rules of Evidence do not apply; and
- (2) all relevant evidence of reasonably probative value may be received.

**(b) Admissibility.**--

(1) Except as set forth in paragraph (2), all relevant evidence is admissible, including hearsay evidence, if it is of a type commonly relied on by a reasonably prudent individual in the conduct of the affairs of the individual.

(2) Evidence may be ruled inadmissible if the evidence:

- (i) Is irrelevant, immaterial or unduly repetitious.
- (ii) Is excludable on:

- (A) constitutional grounds;
- (B) statutory grounds; or
- (C) the basis of a judicially recognized evidentiary privilege.

(3) The presiding officer:

(i) shall rule evidence inadmissible under paragraph (2) if objection is made at the time the evidence is offered; and

(ii) may rule evidence under paragraph (2) inadmissible in the absence of an objection.

(4) If the presiding officer rules evidence inadmissible under paragraph (3), the offering party may make an offer of proof before further evidence is presented or at a later time determined by the presiding officer.

(5) Evidence may be received in a hearing record if doing so will expedite the hearing without substantial prejudice to a party. Documentary evidence may be received in the form of a copy if the original is not readily available or by incorporation by reference. On request, parties shall be given an opportunity to compare the copy with the original.

(6) Testimony shall be made under oath or affirmation.

(7) Evidence shall be made part of the hearing record. Information or evidence may not be considered in determining the case unless it is part of the hearing record.

(8) If the hearing record contains confidential information, the presiding officer may do all of the following:

- (i) Conduct a closed hearing to discuss the information.
- (ii) Issue a necessary protective order.
- (iii) Seal all or part of the hearing record.

(9) The presiding officer may take official notice of facts of which judicial notice may be taken and of scientific, technical or other facts within the specialized knowledge of the agency. The presiding officer shall notify the parties at the earliest practicable time of the facts proposed to be noticed and their source, including staff memoranda or data. Each party shall be afforded an opportunity to contest an officially noticed fact before the decision becomes final.

(10) The experience, technical competence and specialized knowledge of the presiding officer may be used in evaluating the evidence in the hearing record.

**(c) Hearsay evidence.--**

(1) Hearsay evidence is not competent evidence to support a finding of fact if it is properly objected to.

(2) Hearsay evidence that is admitted without objection will be given its natural probative effect and may support a finding of fact if it is corroborated by competent evidence, but a finding of fact may not be based solely on hearsay evidence.

**Source:** New. Adopting section 404 of the Model Act.

**Comment:**

*Subsection (b)*—This subsection codifies the rule that hearsay evidence is admissible in administrative proceedings whether or not a hearsay exception applies. This is a relaxed standard for admissibility in contrast to the evidence rule in civil jury proceedings, in which hearsay evidence is not admissible unless a hearsay exception applies. Under this subsection, evidence is unduly repetitious if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. In most states a presiding officer’s determination that evidence is unduly repetitious may be overturned only for abuse of discretion. The term “statutory” in paragraph (2)(ii)(B) refers to 42 Pa.C.S. Ch. 61 (Rules of Evidence), among other applicable statutes.

**Subsection (c)**—Paragraph (2) codifies the legal residuum rule. See *Commonwealth, Unemployment Compensation Board of Review v. Ceja*, 427 A.2d 631 (Pa. 1981); *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Commw. Ct. 1976).

**§ 505. Notice.**

**(a) Requirement.--**Except as otherwise set forth in section 506 (relating to emergency adjudication procedure), an agency shall give notice which complies with this section.

**(b) Contents.--**

(1) In an administrative proceeding initiated by a person other than an agency, not later than five days after filing, the agency shall give notice to all parties that the case has been commenced. The notice must contain all of the following:

- (i) Docketing information of the administrative proceeding and a general description of the subject matter.
- (ii) Contact information for communicating with the agency.

(iii) Name, official title and contact information of the attorney or employee who has been designated to represent the agency.

(iv) Names and last known addresses of all parties and other persons that are being given actual notice by the agency.

(2) In an administrative proceeding initiated by an agency, the agency shall give notice to the person against which the action is brought. The notice must contain all of the following:

(i) A statement that a case that may result in an order has been commenced against the party.

(ii) A statement of the matters asserted and the issues involved.

(iii) A statement of the legal authority under which the hearing will be held, citing statutes and regulations involved.

(iv) Docketing information of the administrative proceeding.

(v) Name, official title and contact information of the presiding officer and of the agency's representative.

(vi) A statement that a party that fails to attend or participate in a proceeding in the case may be held in default.

(vii) A statement that the party served may request a hearing and instructions about how to request a hearing.

(viii) Names and last known addresses of all parties and other persons that are being given actual notice by the agency.

(3) A notice under this subsection may include other matters that the agency or presiding officer considers desirable to expedite the proceedings.

**(c) Time.**--The agency must give parties notice under this section at least 30 days before a hearing or prehearing conference.

**Source:** New. Adopting section 405 of the Model Act.

**Comment:**

*Subsection (b)(1)*—This paragraph provides the notice requirements for an agency when a person other than an agency initiates an administrative proceeding, as when an individual applies for a license or a government benefit, and the agency denies the application, and the person commences an administrative proceeding to challenge the denial of the application. When an administrative proceeding is commenced, this paragraph requires the agency to give notice to all parties that the proceeding has been commenced. The notice must contain the items listed in this paragraph.

*Subsection (b)(2)*—This paragraph applies when an agency initiates an administrative proceeding against a person other than the agency. For instance, this paragraph applies when the agency seeks the revocation of an existing professional license or seeks to terminate a recipient's governmental benefits. When the agency is required to provide the licensee or recipient with the opportunity for an administrative hearing, the notice requirements of this subsection apply.

**§506. Emergency adjudication procedure.**

(a) **Authorization.**--Unless prohibited by statute other than this title, an agency may conduct an emergency proceeding under this section.

(b) **Justification.**--An agency may take action and issue an order under this section only to deal with an imminent peril to the public health, safety or welfare.

(c) **Due process.**--Before issuing an order under this section, an agency, if practicable, must give notice and an opportunity to be heard to the person to which the agency action is directed. The notice of the hearing and the hearing may be oral or written and may be by telephone, facsimile or other electronic means.

(d) **Order.**--

(1) An order issued under this section must briefly explain the factual and legal reasons for using emergency adjudication procedures.

(2) An agency must give notice to the person to whom the agency action is directed that an order has been issued.

(e) **Hearing.**--After issuing an order under this section, an agency shall proceed as soon as practicable to provide notice and an opportunity for a hearing following the procedure under section 503 (relating to procedure) to determine the issues underlying the order.

(f) **Effectiveness.**--

(1) An order under this section takes effect when signed by the agency head or the designee of the agency head.

(2) Subject to section 511 (relating to stays pending appeal), an order issued under this section terminates upon the earlier of:

- (i) 180 days after it takes effect under paragraph (1); or
- (ii) the termination date specified in the order.

**Source:** New. Adopting section 407 of the Model Act.

**Comment:** An emergency adjudication procedure is provided to permit an immediate adjudication, while also providing some minimal protections to parties against whom such action is taken. Emergencies regularly occur that immediately threaten public health, safety or welfare: licensed health professionals may endanger the public; developers may act rapidly in violation of law; or restaurants may create a public health hazard. In these cases the agencies must possess the power to act rapidly to curb the threat to the public. On the other hand, when the agency acts in such a situation, there should be some modicum of fairness, and the standards for invoking this remedy must be clear, so that the emergency label may be used only in situations where it fairly can be asserted that rapid action is necessary to protect the public. Federal and state case law have held that in an emergency situation an agency may act rapidly and postpone any formal hearing without violation, respectively, of federal or state constitutional law. *FDIC v. Mallen*, 486 U.S. 230 (1988); *Gilbert v. Homar*, 520 U.S. 924 (1997). All agencies have the needed power to act without delay, but there is provision for some type of brief hearing, if feasible. The provision limits the agency to action of this type only in a genuine, defined emergency. There are pre- and postdeprivation protections. This section seeks to strike an appropriate balance between public need and private fairness. This section does not apply to an emergency adjudication, cease and desist order, or other action in the nature of emergency relief issued pursuant to express statutory authority arising outside of the APA.

**§ 507. Ex parte communications.**

(a) **Scope of section.**--For the purpose of this section, an administrative proceeding is pending from the issuance of notice under section 505 (relating to notice).

(b) **Due process.**--When an administrative proceeding is pending, except as set forth in subsection (c), (d), (e) or (f), the presiding officer or final decision maker may not communicate with any person concerning the case without notice and opportunity for all parties to participate in the communication.

(c) **Multimember body.**--If a presiding officer is a member of a multimember body of individuals who constitute the final decision maker, the presiding officer may communicate with the other members of that body when sitting as the presiding officer and final decision maker.

(d) **Statutory authorization or uncontested procedure.**--A presiding officer or final decision maker may communicate about a pending administrative proceeding if any of the following apply:

(1) The communication is required for the disposition of ex parte matters authorized by law.

(2) The communication concerns an uncontested procedural issue.

(e) **Legal and ministerial communications.**--A presiding officer or final decision maker may communicate about a pending administrative proceeding if all of the following paragraphs apply:

(1) The communication is:

(i) on legal issues, with an individual authorized by law to provide legal advice to the presiding officer or final decision maker; or

(ii) on ministerial matters with an individual who serves on the administrative staff of the presiding officer or final decision maker.

(2) The individual referred to in paragraph (1) has not served as investigator, prosecutor, advocate or advisor related to the matter.

(f) **Staff communications.**--An agency head who is the presiding officer or final decision maker in a pending administrative proceeding may communicate about that matter with an employee or representative of the agency if all of the following paragraphs apply:

(1) The employee or representative has not served and will be precluded from serving as investigator, prosecutor, advocate or witness relating to the matter.

(2) The employee or representative has not otherwise had a communication with any person about the case other than a communication authorized under subsection (d) or (e) or this subsection.

(3) The communication is an explanation of:

(i) the technical or scientific basis of, or technical or scientific terms in, the evidence in the hearing record; or

(ii) the precedent, policies or procedures of the agency.

(g) **Disclosure.**--If a presiding officer or final decision maker makes or receives a communication in violation of this section, the presiding officer shall disclose it to the parties.

(h) **Response.**--If a communication prohibited by this section is made, the presiding officer or final decision maker shall permit parties to respond to the prohibited communication.

(i) **Remedial action.**--The presiding officer or final decision maker may be disqualified under section 502(c) (relating to presiding officer) if the presiding officer or final decision maker is culpable in participating in the prohibited communication. Other appropriate relief may be

granted, including an adverse ruling on the merits of the case against a party or agency that culpably participated in the prohibited communication.

**Source:** New. Adopting section 408 of the Model Act.

**Comment:** This section deals with an issue that was exhaustively considered by the drafters of the Model Act. Both for the ULC and the drafters of the APA, consideration of this issue involved balancing the need to avoid the possibility of actual or perceived undue influence on the agency with the need for consultation between agency staff and adjudicators.

*Subsection (b)*—This subsection prohibits ex parte communications but recognizes four exceptions to the prohibition that are codified in subsections (c), (d), (e), and (f). The prohibition under this subsection applies to ex parte communications between the presiding officer and the agency head or other person or body to whom the power to hear or decide is delegated.

*Subsection (c)*—This subsection excludes from the general prohibition communications between the presiding officer and other members of a multimember board that is the final decision maker.

*Subsection (d)*—This subsection prescribes limited exceptions for ex parte communications authorized by statute or for uncontested procedural issues. The first exception is for disposition of ex parte matters authorized by a statute other than the APA. The second exception applies to communications related to uncontested procedural issues. This exception does not apply to contested procedural issues, nor does it apply to issues that do not easily fall into the procedural category. For example, communications related to the physical security or to the credibility of a party or witness are prohibited by this subsection.

*Subsection (e)*—This subsection prescribes limited exceptions for communications with legal advisors, and ministerial communications with staff of the presiding officer and the final decision maker. The first exception allows communications by a presiding officer or final decision maker with an individual authorized by law to provide legal advice to the presiding officer or final decision maker or on ministerial matters with a member of the staff of the presiding officer or final decision maker. This recognizes the role of agency counsel and staff in advising agency officials in adjudication. Both exceptions require that the communicating individual must not have served as an investigator, prosecutor, or advocate in the same contested case. The requirement proposed by the Model Act that the communication “must not augment, diminish, or modify the evidence in the record” is omitted because the working group for this report considered that language to be too vague.

*Subsection (f)*—This subsection permits some communications about a pending contested case between an agency employee or representative and the presiding officer or final decision maker in that case. The communication is authorized by this section if the communicator has not served and will be precluded from serving as an investigator, prosecutor, advocate, or witness in the case and has not made an unauthorized communication under this section. The communication must further satisfy one of two other alternatives: it must be an explanation of the technical or scientific basis or terms in the evidence in the agency hearing record (subsection (f)(3)(i)) or an explanation of the precedent, policies, or procedures of the agency (subsection (f)(3)(ii)). The Model Act proposes a third alternative authorization limited to communications that do not “address the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses”; the drafting committee rejected that provision as too unwieldy. As with subsection (e), the requirement proposed by the Model Act that the

communication “must not augment, diminish, or modify the evidence in the record” is omitted because the drafting committee believed that language to be too vague.

This subsection represents a compromise reached by the ULC drafting committee in response to polar positions that advocated on the one hand for no agency head exception (thus deleting subsection (f) entirely), and views on the other hand that supported a blanket exception for communications between an agency head and his or her staff (with only the language of subsection (f) and not the added language in subsection (f)(1),(2), or (3)). The ULC argues that this middle ground recognizes the need for agency heads, who often lack legal or technical knowledge of the issues that come before the agency, to obtain staff advice when acting as a presiding officer or a final decision maker, but also carefully circumscribes the types of communication that can occur.

*Subsection (g)*—This subsection requires the presiding officer to disclose to the parties any communications that violate this section. The manner of such disclosure is left to regulations. Cf. Model Act § 408(f).

*Subsection (h)*—This subsection requires the presiding officer or final decision maker to permit the parties to respond to prohibited communications. The manner of doing so is left to regulations. Cf. Model Act § 408(g).

*Subsection (i)*—The parts of the record that pertain to a communication in violation of this section may be sealed by protective order as “other appropriate relief.” Cf. Model Act §408(i).

#### **§ 508. Absent parties.**

**(a) Authorization.**--Unless otherwise provided by statute other than this title, if a party without good cause fails to attend or participate in a prehearing conference or hearing in an administrative proceeding, the presiding officer:

(1) may conduct further proceedings necessary to complete the adjudication without the absent party; and

(2) shall determine all issues in the administrative proceeding, including those affecting the absent party.

**(b) Basis of order.**--

(1) An order issued against the party must be based on the party's admissions or other evidence which may be used without notice to the party.

(2) If the burden of proof is on the absent party to establish that the party is entitled to the agency action sought, the presiding officer may issue an order without taking evidence.

**(c) Vacation of order.**--

(1) Not later than 30 days after notice to a party that an order has been issued under subsection (a), the party may petition the presiding officer to vacate the order.

(2) Upon consideration of a petition submitted under paragraph (1), the presiding officer may vacate the order upon a showing of good cause for the party's failure to appear.

**Source:** New. Adopting section 412 of the Model Act.

**§ 509. Decisions and orders.**

**(a) Filing recommended decision.**--If the presiding officer is not delegated final decision making authority by the agency head, the presiding officer shall file and serve on the parties and the agency head a recommended decision and a list of all documents and other evidence submitted by the parties and made part of the hearing record. A recommended decision shall include:

- (1) findings of fact;
- (2) analysis of the issues;
- (3) conclusions of law with citation to legal authority; and
- (4) a proposed order.

**(b) Procedure after recommended decision.**--

(1) A party must file with the agency head exceptions to the recommended decision no later than 30 days after the filing date of the recommended decision. The exceptions must be served on any other party and the presiding officer.

(2) Exceptions must specify the errors in the presiding officer's recommended decision. Exceptions must be accompanied by a brief.

(3) A response to the exceptions must be filed and served on the other party and the presiding officer within 14 days of the filing date of the exceptions. The time for response may be extended by agreement of the parties with the approval of the agency head. A response must be accompanied by a brief.

(4) Within 30 days of the filing of the recommended decision, the presiding officer shall file with the agency head the record of the proceeding.

(5) If exceptions are filed, the agency head may:

- (i) adopt or modify the recommended decision in whole or in part; or
- (ii) recommit the matter to the presiding officer with instructions.

(6) If the agency head does not adopt a finding of fact made by the presiding officer or modifies a finding of fact made by the presiding officer, the agency head shall set forth the reasons for the action in the final decision. In reviewing findings of fact in a recommended decision, the agency head shall consider the presiding officer's opportunity to observe the witnesses and to determine the credibility of the witnesses.

(7) Upon review of exceptions or if no exceptions are filed, the agency head shall:

- (i) Act under paragraph (5).
- (ii) Issue an adjudication which may:
  - (A) adopt the recommended decision; or
  - (B) state that, in the absence of exceptions, the recommended decision is entered as the agency head's final order.

(8) Findings of fact and conclusions of law in a presiding officer's recommended decision are not controlling in any subsequent proceeding unless expressly adopted by the agency head.

(9) Unless otherwise ordered by the agency head, failure to file a timely exception to a finding of fact or conclusion of law in a recommended decision adopted without material modification shall be deemed a waiver of further appeal as to that finding or conclusion.

**(c) Final orders.**--The presiding officer shall issue a final order if the presiding officer:

- (1) is the agency head; or
- (2) has been delegated final decision-making authority.

**(d) Issuance of orders.**--An order is issued under this section when it is signed by the agency head, the presiding officer or an individual authorized by statute other than this title.

**(e) Service.**--

(1) Except as set forth in paragraph (2), a recommended order or final order shall be served in a hearing record on each party and the agency head within 90 days of the later of:

- (i) the end of the hearing;
- (ii) the closing of the hearing record; or
- (iii) the last date for submission of memoranda, briefs or proposed findings.

(2) The presiding officer may extend the time under paragraph (1) by stipulation, waiver or a finding of good cause.

**(f) Effective date of final order.**--

(1) Except as set forth in paragraph (2), a final order is effective 30 days after all parties are notified of the order.

(2) Paragraph (1) does not apply if action is taken under:

- (i) section 510 (relating to reconsideration); or
- (ii) section 511 (relating to stays pending appeal).

**Source:** New. Adopting section 413 of the Model Act.

**Comment:** Emergency orders are issued under section 506. The APA provides for two kinds of orders: recommended and final. Recommended orders are issued by the presiding officer and are subject to review by the agency head. If he or she approves the order, it becomes a final order. The agency head may modify the recommended order and issue the order as modified as a final order. The Model Act provides for a third kind of order, known as an initial order, which may be issued by a presiding officer who has been delegated final decisional authority; however, Model Act section 414 provides that the agency head may review an initial order on the agency head's initiative. Since an initial order may also be overturned by the agency head, the drafting committee viewed it as essentially similar to a recommended order.

*Subsection (b)*—

Paragraph (6) adopts 414(e) of the Model Act.

Paragraph (8) authorizes the agency head to determine whether a finding of fact or conclusion of law will have binding effect in future proceedings. Agencies are encouraged, but not required, to follow their precedents. See *Standard Fire Insurance Co. v. Insurance Department*, 611 A.2d 456 (Pa. Commw. Ct. 1992).

## **§ 510. Reconsideration.**

**(a) Petition for reconsideration.**--A party may seek reconsideration by filing a petition stating the specific grounds on which relief is requested within 15 days after notice to the parties that a final order has been issued.

**(b) Time for filing petition for judicial review.**--

(1) If the conditions in paragraph (2) are met, the time for filing a petition for judicial review begins when the agency disposes of the petition for reconsideration.

(2) Paragraph (1) applies if all of the following apply:

(i) A petition for reconsideration is timely filed.

(ii) The petitioner has complied with the agency's procedural regulations for reconsideration.

(c) **Order maker.**--Not later than 20 days after a petition is filed under subsection (a), the decision maker shall issue a written order doing one of the following:

- (1) Denying the petition.
- (2) Granting the petition. An order under this paragraph:
  - (i) must state findings of facts, conclusions of law and the reasons for granting the petition; and
  - (ii) shall:
    - (A) dissolve or modify the final order; or
    - (B) set the matter for further proceedings.

(d) **Deemed denial.**--If the decision maker fails to respond to the petition within the time period under subsection (c), the petition is deemed denied.

**Source:** New. Adopting section 416 of the Model Act.

**Comment:**

*Subsection (b)*—This tolling provision enables a party to seek reconsideration without exhausting the time for filing a judicial appeal.

**§ 511. Stays pending appeal.**

(a) **Request.**--Except as otherwise provided by statute other than this title, a party may request the agency head to stay a final order pending judicial review. The request must be made not later than seven days after the parties are notified of the order.

(b) **Grant.**--The agency head may grant the request for a stay pending judicial review if all of the following apply:

- (1) The party demonstrates a strong likelihood of success on the merits of the appeal.
- (2) The denial of the stay will cause irreparable harm.
- (3) The stay will not substantially harm other interested parties.
- (4) The stay will not substantially harm the public interest.

(c) **Appellate review.**--The agency head may take other action authorized by Pa.R.A.P. Ch. 17 (relating to effect of appeals; supersedeas and stays).

**Source:** New. Subsection (a) adopts section 417 of the Model Act.

**Comment:**

*Subsection (b)*—This subsection inserts the criteria for grant of a stay that were propounded in *Pennsylvania Public Utility Commission v. Process Gas Consumer Group*, 467 A.2d 805 (Pa. 1983).

## CHAPTER 6

### Office of Administrative Hearings

**Comment:** Twenty-seven states have established central panel agencies. The state statutes creating a central panel are cited in Table 3 on page 38. Chapter Six of the APA has been drafted to include the necessary minimum provisions for a state to adopt a central panel hearing agency. Chapter 6 of the Model Act is largely based on the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings), adopted by the American Bar Association on February 3, 1997.

#### § 601. Establishment and function.

(a) **Establishment.**--The Office of Administrative Hearings is established as an independent office in the Executive Department.

(b) **Function.**--The office shall administer all administrative proceedings unless the agency head or an adjudicative board or commission that is not an agency head hears the matter without delegation or assignment. If a matter is heard without delegation or assignment, a multimember agency head or an adjudicative board or commission may designate a member to be the presiding officer.

**Source:** New. Subsection (a) adopts section 601(b) of the Model Act.

#### § 602. Organization.

(a) **Chief administrative law judge.**--The powers and duties of the office shall be vested in a chief administrative law judge appointed by the Governor with the advice and consent of two-thirds of the members elected to the Senate.

(b) **Qualifications.**--The chief administrative law judge must meet all of the following:

- (1) Have been an attorney at law for at least five years.
- (2) Be an attorney at law in good standing with the Supreme Court.
- (3) Have substantial experience in administrative law.

(c) **Tenure.**--

(1) The chief administrative law judge shall serve a term of five years and until a successor is appointed and qualifies for office.

(2) A chief administrative law judge may be reappointed subject to confirmation under subsection (a).

(3) The chief administrative law judge may be removed from office only for cause. A removal may be contested by a petition for review which has been filed within 30 days under 42 Pa.C.S. § 761(a)(1) (relating to original jurisdiction).

(d) **Salary.**--The salary of the chief administrative law judge shall be set under section 709(a) of the act of April 9, 1929 (P.L.177, No.175), known as The Administrative Code of 1929.

(e) **Obligations.**--

(1) The chief administrative law judge shall devote full time to the duties of the office and may not engage in the private practice of law.

(2) The chief administrative law judge is subject to the code of conduct under section 604(a)(7)(i) (relating to chief administrative law judge).

(f) **Oath.**--The chief administrative law judge must take the oath of office required by law before beginning duties as an administrative law judge.

**(g) Deputies and acting chief.--**

(1) The chief administrative law judge may designate administrative law judges as deputy chief administrative law judges.

(2) If a vacancy occurs in the office of chief administrative law judge, the Governor shall designate in writing an administrative law judge to exercise the powers and perform the duties of chief administrative law judge until the vacancy is filled.

**Source:** New. Adopting section 602 of the Model Act.

**§ 603. Administrative law judges.**

**(a) Appointment.--**

(1) The chief administrative law judge shall appoint administrative law judges.

(2) An administrative law judge is a management employee:

(i) subject to the administrative supervision of the chief administrative law judge; and

(ii) may be removed only for cause.

**(b) Qualifications.--**To be eligible for appointment as an administrative law judge, an individual must meet all of the following:

(1) Have been an attorney at law for at least five years.

(2) Be an attorney at law in good standing with the Supreme Court.

(3) Have substantial experience in administrative law.

**(c) Oath.--**An administrative law judge must take the oath of office required by law before beginning duties as an administrative law judge.

**(d) Code of conduct.--**An administrative law judge is subject to the code of conduct for administrative law judges adopted under section 604(a)(7)(i) (relating to chief administrative law judge).

**(e) Compensation.--**An administrative law judge is entitled to the compensation set under section 709(a) of the act of April 9, 1929 (P.L.177, No.175), known as The Administrative Code of 1929.

**(f) Powers and duties.--**

(1) In an administrative proceeding, the following apply:

(i) The chief administrative law judge shall assign an administrative law judge to be the presiding officer.

(ii) If the administrative law judge is delegated final decisional authority, the administrative law judge shall issue a final order.

(iii) If the administrative law judge is not delegated final decisional authority, the administrative law judge shall issue to the agency head a recommended order in the administrative proceeding.

(2) Except as otherwise provided by statute other than this chapter, if an administrative proceeding is referred to the office by an agency, the agency may not take further action with respect to the proceeding, except as a party, until a final order is issued.

(3) An administrative law judge may perform duties authorized by statute other than this chapter.

**Source:** New. Adopting section 603 of the Model Act.

**Comment:** Employees of the Office of Administrative Hearings are not covered by the Civil Service Act (1941 Act No. 286, P.L.752), § 3. The procedures and methods utilized for hiring OAH employees are to be determined by the Chief ALJ as part of his or her management powers under section 604(b)(1). The drafting committee concluded that the civil service structure was too rigid to be suitable for the OAH. For instance, it is unlikely that a multiple choice test would be very useful in selecting ALJs.

*Subsection (f)*—Agency heads are not granted the power to reject the Chief ALJ’s choice of ALJ to handle a particular matter.

**§604. Chief administrative law judge.**

**(a) Powers and duties.**--The chief administrative law judge has the following powers and duties:

- (1) Supervise and manage the office.
  - (2) Serve as an administrative law judge in an administrative proceeding.
  - (3) Assign an administrative law judge in an administrative proceeding.
  - (4) Assure the decisional independence of each administrative law judge.
  - (5) Establish and implement standards for equipment, supplies and technology for administrative law judges.
  - (6) Provide and coordinate continuing education programs and services for administrative law judges and advise them of changes in the law concerning their duties.
  - (7) Promulgate regulations to implement this chapter, including the following:
    - (i) A code of conduct for administrative law judges.
    - (ii) General rules of administrative practice and procedure governing administrative proceedings before administrative law judges.
  - (8) Adopt policy statements on administrative hearings.
  - (9) Set reasonable filing fees to cover the administrative expenses of the office.
- Fees under this paragraph shall not be charged to:
- (i) Commonwealth agencies; or
  - (ii) petitioners who are determined by the office to be unable to pay the fees.
- (10) Monitor the work of administrative law judges and discipline administrative law judges who do not meet appropriate standards of conduct and competence.
  - (11) Establish necessary classifications for case assignment on the basis of subject matter, expertise and case complexity.
  - (12) Accept money for the benefit of the office and deposit the money into the State Treasury subject to future appropriation.
  - (13) Contract with other Commonwealth agencies for services provided by the office.
  - (14) Furnish administrative law judges on a contractual basis to political subdivisions and municipal authorities and instrumentalities.
  - (15) Appoint a chief counsel and assistant counsel. Section 301 of the act of October 15, 1980 (P.L.950, No.164), known as the Commonwealth Attorneys Act, does not apply to the office.
  - (16) Create and maintain a public docket of administrative proceedings administered by the office.

**(b) Report.**--The chief administrative law judge shall submit an annual report on the activities of the office to the Governor, the Secretary of the Senate and the Chief Clerk of the House of Representatives.

**Source:** New. Adopting section 604 of the Model Act.

**Comment:**

*Subsection (a)*—The authority of the chief administrative law judge to promulgate rules of practice and procedure under paragraph (7) applies to “administrative proceedings before administrative law judges.” It does not apply to agency heads or boards and commissions described in section 502(a)(3), although they may adopt parallel rules under their own regulatory authority. It is anticipated that the Chief ALJ will consult with affected agencies before promulgating rules that affect matters concerning those agencies. Regulations promulgated under this subsection are subject to the Commonwealth Documents Law (1968 Act No.240, P.L.769) and the Independent Regulatory Review Act (1982 Act No.181, P.L.663). Until the Office of Administrative Hearings promulgates regulations under this section, agencies may follow the General Rules of Administrative Practice and Procedure (1 Pa. Code Ch. 31, 33, and 35). Paragraph (10) is intended to facilitate flexibility in the assignment of ALJs to cases. The chief can assign cases in accordance with the expertise of particular ALJs and can assign particularly difficult cases to the most senior or the most able ALJs .Under paragraph (15), attorneys employed by OAH are exempt from the administrative jurisdiction of the Office of General Counsel. The Chief ALJ may appoint assistant counsel as needed and assign their duties.

**§ 605. Cooperation.**

Commonwealth agencies shall cooperate with the chief administrative law judge in the discharge of the duties of the office.

**Source:** New. Adopting section 605 of the Model Act.

**Comment:** The ULC suggests that agencies cooperate with the office of administrative hearings by providing information and coordinating schedules for administrative hearings. Most importantly, the agencies that are under the jurisdiction of the OAH should use its ALJs for all administrative proceedings unless the agency head presides over the hearing; such agencies should not assign staff attorneys to perform this function.

**§ 606. Index of adjudications.**

**(a) Index.--**

(1) Except as set forth in subsection (b), the office shall create an index of adjudications and make the index and the adjudications available to the public. Reasonable costs may be charged.

(2) The index shall be searchable in a manner that permits public access.

**(b) Records not included in index.--**

(1) Except as set forth in paragraph (2), an adjudication which is exempt, privileged or otherwise made confidential or protected from disclosure by the act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law, is not a public record and may not be indexed. An adjudication under this paragraph shall be excluded from an index and disclosed only by order of the agency head with a written statement of reasons attached to the order.

(2) If the agency head determines it is possible to redact an adjudication which is exempt, privileged or otherwise made confidential or protected from disclosure by statute other than this title so that it complies with applicable law, the redacted adjudication may be placed in the index and published.

**Source:** New. Adopting section 418 of the Model Act.

**Comment:** The manner in which the Chief ALJ compiles the index in cooperation with the agencies is left to regulations or guidelines. The provision is drafted so as to give the Chief ALJ maximum flexibility with respect to the technical specifics relating to the index in order to enable him or her to adapt to changing technologies. The index of adjudications is not to be confused with the docket, which is the formal abridged record of the case, including a list of the documents filed in the case. See section 604(a)(16).

## **CHAPTER 7** Judicial Review

### **Subchapter A** Judicial Review of Commonwealth Agency Actions

#### **§ 701. Scope of subchapter.**

(a) **Coverage.**--Except as set forth in subsection (b), this subchapter shall apply to adjudications of Commonwealth agencies regardless of an express statutory provision:

- (1) precluding appeal or review; or
- (2) declaring an adjudication final or conclusive.

(b) **Exceptions.**--This subchapter does not apply to any of the following:

- (1) A matter which is exempt under section 501(c) (relating to scope of subchapter).
- (2) An appeal from a Commonwealth agency which may be taken initially to the courts of common pleas under 42 Pa.C.S. § 933(a)(1) (relating to appeals from government agencies).

**Source:** 2 Pa.C.S. § 701.

**Comment:** This section preserves prior law by providing that proceedings that are exempted from the provisions relating to administrative hearings under section 501(c) are exempted from the provisions relating to judicial review as well. Also exempted from the provisions relating to judicial review are appeals from a Commonwealth agency that may be taken initially to the court of common pleas under 42 Pa.C.S. § 933(a)(1). A consequence of the limitation of the right of judicial review to adjudications is that this right does not apply to determinations that are not final. The drafting committee considered and rejected a provision that would have allowed review of nonfinal determinations on certain equitable grounds. See Model Act § 501(c).

Except as provided by a statute other than this title, the sole remedy for challenging an adjudication is by judicial appeal. Consequently, collateral attack of the order in response to civil or criminal proceedings for enforcement is excluded. Cf. Model Act § 502(b).

**§ 702. Standing.**

A person aggrieved by an adjudication of a Commonwealth agency that has a direct interest in the adjudication may appeal from the agency under 42 Pa.C.S. § 763(a)(1) (relating to direct appeals from government agencies).

**Source:** 2 Pa.C.S. § 702.

**Section 703. Preservation of issues.**

**(a) Waiver.**--Except as set forth in subsection (b), a party must raise an issue before the Commonwealth agency in order to preserve the issue for appeal.

**(b) Exceptions.**--

(1) A party that proceeded before a Commonwealth agency under a particular statute may challenge the statute's validity in the appeal.

(2) The court, for cause shown, may allow a party to raise on appeal an issue not raised before the Commonwealth agency.

**(c) Equitable relief.**--The remedy at law provided by subsections (a) and (b) shall not impair the right to equitable relief.

**Source:** 2 Pa.C.S. § 703.

**Comment:**

*Subsection (b)*—Paragraph (1) recognizes that an agency cannot be expected to rule impartially on the constitutional validity of the agency's own enabling statute, and therefore permits a party making such a challenge to raise it on appeal, regardless of whether the party raised it before the agency.

**Section 704. Disposition of appeal.**

**(a) Scope of review.**--The court shall hear the appeal on the record certified by the Commonwealth agency.

**(b) Standard of review.**--

(1) The court shall affirm the adjudication unless it finds one of the following:

(i) The adjudication is in violation of a constitutional right of the appellant.

(ii) The adjudication is not in accordance with law.

(iii) There was a violation of Ch. 5 Subch. A (relating to practice and procedure of Commonwealth agencies).

(iv) A finding of fact made by the Commonwealth agency and necessary to support its adjudication is not supported by substantial evidence.

(v) The adjudication is arbitrary, capricious or an abuse of discretion.

(2) This subsection shall not apply if it conflicts with a statute other than this title.

**(c) Order.**--The court may enter an order authorized by 42 Pa.C.S. § 706 (relating to disposition of appeals).

**Source:** 2 Pa.C.S. § 704.

**Comment:**

*Subsection (b)*—This section does not apply to appeals from the Board of Finance and Revenue. See Tax Reform Code of 1971, § 2704(i), which requires de novo review of such appeals. There may be other exceptions provided by statutory law other than the APA.

**§705. Time limitation.**

The time limit for taking an appeal from an adjudication is subject to 42 Pa.C.S. § 5571(b) (relating to appeals generally).

**Source:** New.

**§ 706. Stays pending appeal.**

During pendency of a petition for review, a party may obtain a stay under the Pennsylvania Rules of Appellate Procedure.

**Source:** New.

**§ 707. Exhaustion of administrative remedies.**

**(a) Effect of certain filings.**--Filing a petition for reconsideration or a stay of proceedings is not a prerequisite for seeking judicial review.

**(b) Authority of court.**--The court may relieve a petitioner of a requirement to exhaust an administrative remedy to the extent that:

- (1) the administrative remedy is inadequate; or
- (2) the requirement would result in irreparable harm.

**Source:** New. Adopting section 506(b) and (d) of the Model Act.

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PRIOR PRINTER'S NO. 1649

PRINTER'S NO. 4136

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE RESOLUTION

No. 247 Session of  
2011

INTRODUCED BY CALTAGIRONE, BRENNAN, COHEN, D. COSTA, CUTLER,  
FABRIZIO, KORTZ, KOTIK, MILNE, MURT, READSHAW AND REICHLEY,  
APRIL 27, 2011

AS REPORTED FROM COMMITTEE ON JUDICIARY, HOUSE OF  
REPRESENTATIVES, AS AMENDED, OCTOBER 1, 2012

A RESOLUTION

1 Directing the Joint State Government Commission to study and  
2 make recommendations to the General Assembly on the practice  
3 of administrative law before the Commonwealth's hearing  
4 boards.

5 WHEREAS, Several departments and independent agencies of the  
6 Commonwealth engage in adjudicatory review of actions which the  
7 department, independent agency or the public initiate in order  
8 to further the department's purposes; and

9 WHEREAS, Although Title 2 of the Pennsylvania Consolidated  
10 Statutes provides for a uniform system of adjudicatory review,  
11 it does not provide for efficiency in hiring and training of  
12 hearing officers and administrative law judges, nor does it  
13 provide for uniform docketing procedures and centralized  
14 publication of adjudicatory decisions; and

15 WHEREAS, The legislative and executive branches of government  
16 in the Commonwealth engage in investigating cost-cutting  
17 measures in order to create balanced and fair budgets; and

18 WHEREAS, Streamlining the adjudicatory practice of

1 administrative law could be a means to cut costs for future  
2 budgets and help shape a balanced budget; therefore be it

3 RESOLVED, That the House of Representatives direct the Joint  
4 State Government Commission to study and make recommendations to  
5 the General Assembly on the practice of administrative law  
6 within the Commonwealth; and be it further

7 RESOLVED, In conducting this study, the Joint State  
8 Government Commission is urged to identify areas for improvement  
9 and reform, including, but not limited to, the following:

10 (1) Identification of uniform professional  
11 qualifications and standards of hearing officers and  
12 administrative law judges.

13 (2) Identification of a centralized system for selection  
14 and oversight of all hearing officers and administrative law  
15 judges.

16 (3) Identification of need and assignment of  
17 responsibility based on subject matter specificity.

18 (4) Separation of advocacy and adjudicatory roles within  
19 each agency.

20 (5) Determination of the need to create a uniform and  
21 understandable docketing system.

22 (6) Identification of a centralized publicly accessible  
23 system to improve access to decisions and opinions.

24 (7) The need for consistent use of the rules of  
25 evidence.

26 (8) Identification of possible cost savings by  
27 eliminating duplication and redundancy and by enhancing  
28 ability to use resources to meet current needs;

29 and be it further

30 RESOLVED, That the Joint State Government Commission file its

1 report with the State Government Committee of the House of  
2 Representatives no later than ~~nine~~ 12 months after the passage ←  
3 of this resolution.



**APPENDIX B**  
**Administrative Agency Law**

---

The following is the text of the current Administrative Agency Law, added to Title 2 of the Pennsylvania Consolidated Statutes by Act 53 of 1978 (P.L.202). These provisions will be superseded by the APA. A disposition table is supplied to show where the provisions of the Law appear in the APA.

**TABLE OF CONTENTS**

**TITLE 2**  
**ADMINISTRATIVE LAW AND PROCEDURE**

**CHAPTER 5**  
**PRACTICE AND PROCEDURE**

**Subchapter**

A. Practice and Procedure of Commonwealth Agencies

**SUBCHAPTER A**  
**PRACTICE AND PROCEDURE OF**  
**COMMONWEALTH AGENCIES**

**Sec.**

- 501. Scope of subchapter.
- 502. Representation.
- 503. Discipline.
- 504. Hearing and record.
- 505. Evidence and cross-examination.
- 505.l. Interpreters for the deaf (Deleted by amendment).
- 506. Briefs and oral argument.
- 507. Contents and service of adjudications.
- 508. Notice to Department of Justice.

**§ 501. Scope of subchapter.**

(a) **General rule.**--Except as provided in subsection (b), this subchapter shall apply to all Commonwealth agencies.

(b) **Exception.**--None of the provisions of this subchapter shall apply to:

(1) Proceedings before the Department of Revenue, Auditor General or Board of Finance and Revenue, involving the original settlement, assessment or determination or resettlement, reassessment or redetermination, review or refund of taxes, interest or payments made into the Commonwealth treasury.

(2) Proceedings before the Secretary of the Commonwealth under the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code.

(3) Proceedings before the Department of Transportation involving matters reviewable under 42 Pa.C.S. § 933 (relating to appeals from government agencies).

(4) Proceedings before the State System of Higher Education involving student discipline.

**§ 502. Representation.**

Any party may be represented before a Commonwealth agency.

**§ 503. Discipline.**

Any Commonwealth agency may, upon hearing and good cause shown, preclude any person from practice before it.

**§ 504. Hearing and record.**

No adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. All testimony shall be stenographically recorded and a full and complete record shall be kept of the proceedings.

**§ 505. Evidence and cross-examination.**

Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted.

**§ 505.1. Interpreters for the deaf (Deleted by amendment).**

**§ 506. Briefs and oral argument.**

All parties shall be afforded opportunity to submit briefs prior to adjudication by a Commonwealth agency. Oral argument upon substantial issues may be heard by the agency.

**§ 507. Contents and service of adjudications.**

All adjudications of a Commonwealth agency shall be in writing, shall contain findings and the reasons for the adjudication, and shall be served upon all parties or their counsel personally, or by mail.

**§ 508. Notice to Department of Justice.**

Before notice of any hearing leading to an adjudication is given by a Commonwealth agency (except the Pennsylvania Public Utility Commission), the agency shall submit the matter to its representative in the Department of Justice who shall pass upon the legality of the proposed action or defense. Failure of the agency to submit the matter to the department shall not invalidate any adjudication.

**CHAPTER 7  
JUDICIAL REVIEW**

**Subchapter**

A. Judicial Review of Commonwealth Agency Action

**SUBCHAPTER A  
JUDICIAL REVIEW OF COMMONWEALTH  
AGENCY ACTION**

**Sec.**

- 701. Scope of subchapter.
- 702. Appeals.
- 703. Scope of review.
- 704. Disposition of appeal.

**§ 701. Scope of subchapter.**

(a) **General rule.**--Except as provided in subsection (b), this subchapter shall apply to all Commonwealth agencies regardless of the fact that a statute expressly provides that there shall be no appeal from an adjudication of an agency, or that the adjudication of an agency shall be final or conclusive, or shall not be subject to review.

(b) **Exceptions.**--None of the provisions of this subchapter shall apply to:

- (1) Any matter which is exempt from Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies).
- (2) Any appeal from a Commonwealth agency which may be taken initially to the courts of common pleas under 42 Pa.C.S. § 933 (relating to appeals from government agencies).

**§ 702. Appeals.**

Any person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure).

**§ 703. Scope of review.**

(a) **General rule.**--A party who proceeded before a Commonwealth agency under the terms of a particular statute shall not be precluded from questioning the validity of the statute in the appeal, but such party may not raise upon appeal any other question not raised before the agency (notwithstanding the fact that the agency may not be competent to resolve such question) unless allowed by the court upon due cause shown.

(b) **Equitable relief.**--The remedy at law provided by subsection (a) shall not in any manner impair the right to equitable relief heretofore existing, and such right to equitable relief is hereby continued notwithstanding the provisions of subsection (a).

**§ 704. Disposition of appeal.**

The court shall hear the appeal without a jury on the record certified by the Commonwealth agency. After hearing, the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa.C.S. § 706 (relating to disposition of appeals).

**Disposition Table**

The following table shows the sections where the provisions in current Title 2 of the Pennsylvania Consolidated Statutes appear in the proposed Administrative Procedure Act.

| <b>2 Pa.C.S.</b> | <b>Administrative Procedure Act</b> |
|------------------|-------------------------------------|
| § 501            | § 501                               |
| § 502            | § 502(h)                            |
| § 503            | Deleted                             |
| § 504            | § 501(b), (i)                       |
| § 505            | §§ 503(d), 504(a)                   |
| § 505.1          | Repealed                            |
| § 506            | § 502(c), (d)                       |
| § 507            | § 509(a), (e)                       |
| § 508            | Deleted                             |
|                  |                                     |
| § 701            | § 701                               |
| § 702            | § 702                               |
| § 703            | § 703                               |
| § 704            | § 704                               |

Section 508 was rendered obsolete by the Commonwealth Attorneys Act (1980 Act No. 164 (P.L. 950)). The function mandated by this section was not allocated to either the Office of General Counsel or the Attorney General.

## **APPENDIX C**

# **OFFICE OF GENERAL COUNSEL HEARING OFFICER PROGRAM**

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The following description of the Office of General Counsel's Hearing Officer Program was furnished to the Commission by Linda C. Barrett, Senior Deputy General Counsel of the Office of General Counsel.

### **I. REASON FOR ESTABLISHING THE PROGRAM**

The Commonwealth of Pennsylvania does not have a centralized administrative hearing officer panel to conduct all adjudicatory hearings. The Office of General Counsel ("OGC") created the Hearing Office Program ("Program") to provide a more centralized and coordinated structure to improve the administrative hearing process, thereby assuring that Pennsylvania's citizens and businesses had their cases heard by fair and impartial hearing officers without sacrificing quality or timeliness. The Program established a central hearing officer panel. Assignments are made by a Chief Hearing Officer appointed by the General Counsel. This centralized framework incorporated current institutional hearing officer hierarchies and created certain standardizations of practice, coordinated training, and imposed stricter accountability. The Program was also aimed at reducing the use of outside hearing officers in favor of in-house hearing officers who would provide hearing officer services to the 33 agencies under the Governor's jurisdiction.

### **II. BACKGROUND WHICH PROMPTED CREATION OF THE PROGRAM**

Prior to September 2003 most hearing officers within the Commonwealth were employed by the agencies they served. These agencies had typically been charged with investigating, prosecuting, and adjudicating cases involving the citizens they regulate. As a result, Pennsylvania developed a fragmented administrative due process system that varied from agency to agency.<sup>80</sup> Agencies had established hearing arrangements ranging from situations in which the agency head conducted the hearing and rendered a decision, or delegated this function to an available non-lawyer employee of the agency, to the use of full- or part-time attorney hearing officers. Some agency hearing officers were within the agency legal staff, which meant they reported to the agency chief counsel who also supervised the prosecutor. There were also circumstances where agency counsel did not participate in the presentation of evidence or determination of factual issues, but the fact finder or decision maker obtained legal advice from the agency legal staff of which the prosecutor was a member.

Each agency also maintained its own separate docketing system with varying levels of sophistication and formality. Some agencies like the Department of State created a prothonotary to maintain the official file and docket. Other agencies had less rigorous requirements. In some

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<sup>80</sup> In Pennsylvania, administrative agencies conduct administrative hearings and related proceedings pursuant to 2 Pa.C.S. §§ 101, *et seq.*, commonly referred to as the Administrative Law and Procedures Act. This statute provides an individual or business the right to a hearing and the right to an appeal. The General Rules of Administrative Practice and Procedure set forth in 1 Pa. Code Part II (§§ 31.1–35.251) typically provides the procedural framework for these proceedings.

instances, the agency personnel office kept track of administrative proceedings. Sometimes basic information was entered into OGC's Document Management System (LawNet) but matters were not always updated at each stage of the proceeding. As a consequence, there was no centralized tracking system that could identify the number of administrative proceedings held in the Commonwealth at any given time.

### III. PROGRAM FRAMEWORK

In September 2003, OGC established a panel of hearing officers consisting of in-house hearing officers along with selected outside attorneys possessing experience with Commonwealth administrative practice. Outside counsel hearing officers are utilized to address conflict of interest issues and respond to capacity concerns when an agency needs to expeditiously adjudicate a large volume of cases. All executive agencies executed a master Memorandum of Understanding ("MOU"). DGS centrally contracts for outside counsel services rather than having each agency enter into separate MOUs and Contracts for Legal Services.<sup>81</sup> In August 2010, OGC entered into an agreement with the Department of Treasury to provide hearing officer services for this independent agency.

The MOU memorializes the relationship and expectations between those agencies with in-house hearing officers who are available to conduct hearings ("hearing officer agencies") and those agencies with a need for a hearing officer ("requesting agencies"). The MOU creates a hearing officer panel, and all agencies are subject to the general oversight and accountability of OGC.

Requests for hearing officers are initially sent from the requesting agency to the Chief Hearing Officer who assigns a hearing officer, who then hears the case and prepares the initial decision. A hearing officer is usually assigned within two business days of receipt of a referral request. Hearings are usually scheduled within two weeks of assignment and held within one to two months of assignment, depending upon the availability of counsel and compliance with the notice requirements of the Sunshine Law.

Certain indicators are tracked through a Hearing Officer Log to determine volume and type of case along with timeliness of the decisions rendered by the hearing officer. The Hearing Officer Log provides a uniform method to capture administrative matters and can generate reports reflecting the number of administrative proceedings handled by the program.

In addition to creating a more centralized framework for assigning and tracking hearing officer functions, the Program provides a more regular and coordinated approach to training and standardization of practice as well as evaluation of existing hearing officers by the agencies they serve. In addition to providing training for panel hearing officers, the Program develops and delivers courses as part of OGC's CLE training program for administrative law practitioners. The

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<sup>81</sup> In the past, any agency that utilized a hearing officer from another Commonwealth agency would execute a separate MOU with that agency. If the same hearing officer heard multiple matters from different agencies, separate MOUs were prepared. In order to streamline and provide some uniformity to this process, the Chief Hearing Officer developed a Master MOU between OGC and all of the agencies under the Governor's jurisdiction which permits OGC to monitor hearing officer assignments for the agencies utilizing this program.

Chief Hearing Officer and other full time in-house hearing officers are often invited to speak at PBI and other CLE venues. Program CLE courses are always well-attended and receive positive evaluations.

#### IV. PROGRAM EVALUATION

##### A. *Case referrals*

OGC has been collecting data on the number of cases handled by the program since the Fall of 2003 and has maintained annual data since 2004. The number of cases varies by year. In the first full year of the program, OGC Hearing Officers handled 214 cases. Since the program began, OGC Hearing Officers have handled 4,382 cases.<sup>82</sup>

Hearing officers perform a variety of functions. Their primary function is to hold administrative hearings and issue proposed reports and recommendations to the appointing agency head. Proposed reports and recommendations to the agency head include findings of fact, discussion of the application of the law to the facts, conclusions of law, and the proposed result. In addition, hearing officers address pre-hearing motions and monitor cases that the parties wish to settle but may require some management to arrive at a settlement. If the case does not settle, the hearing officer schedules a hearing.

The number of agencies utilizing the Program has steadily increased. In 2003, nine agencies referred cases to OGC Hearing Officers; 28 agencies do so now.<sup>83</sup>

##### B. *In-house vs. Outside Hearing Officer Usage*

OGC's panel of hearing officers was initially comprised of three outside hearing officers, one full time in-house hearing officer, Jackie Wiest Lutz, and one part time in-house hearing officer, Senior Deputy General Counsel and Chief Hearing Officer Linda C. Barrett. Other Commonwealth attorneys have been detailed to serve as OGC Hearing Officers on a case by case basis. The number of outside hearing officers has been increased over time in order to address the provision of the Professional Standards and Practice Act requiring a minimum of five hearing officers on its panel.

Originally OGC referred certain types of cases to outside hearing officers because those hearing officers had established expertise; now OGC Hearing Officers handle every type of case referred by agencies. Outside hearing officers are also made available in cases where an actual or possible conflict of interest exists or could arguably arise with the assignment of a Commonwealth hearing officer. In-house hearing officers have handled most of the recent referrals, and the total number of referrals to outside hearing officers has decreased over time.

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<sup>82</sup> This does not include cases handled by BPOA, Insurance or DPW's Bureau of Hearings and Appeals.

<sup>83</sup> The number of cases and agencies varies from year to year based upon the number of appeals filed with those agencies. Nine agencies regularly rely heavily on OGC Hearing Officers: Agriculture, Corrections, Education, Health, Labor and Industry, PSERS, SERS, PSP and Transportation.

### C. *Capacity*

The number of in-house hearing officers has remained relatively stable even though the number of overall referrals continues to increase. This recent increase in referrals has been offset by the addition of the Bureau of Professional and Occupational Affairs (BPOA) hearing officers and BPOA law clerks to the Program on a more full time basis following the March 2012 appointment of OGC's current Chief Hearing Officer Jackie Wiest Lutz as the Chief Hearing Officer at BPOA.

OGC has also deliberately chosen to reduce the number of referrals to outside hearing officers in favor of in-house hearing officers to reduce costs to the agency. In spite of this utilization shift, OGC Hearing Officers have been able to absorb the additional case load without an adverse impact on their availability for hearings and timeliness in issuing opinions.

### D. *Performance*

OGC has periodically surveyed agencies for feedback on the performance of hearing officers. In addition, OGC has informal, but regular, contact with agency chief counsel and docket clerks to discuss program performance. The initial selection of hearing officers was made with great care. The panel was chosen based on experience, judicial temperament, writing ability, knowledge of administrative practice and procedures, and experience with agency areas of practice. Agencies are pleased with the Program and continue to identify new ways to utilize it, especially the talents of our small in-house hearing officer team.

In 2007, the program added DOT's Driver Licensing Bureau hearings without any major impact on its capacity to keep pace with other referrals. This accomplishment should not go unrecognized, especially because all decisions must be issued within 60 days of the hearing. In 2008, OGC, in conjunction with the Chief Counsel at the Department of Agriculture, established an Annual Master Hearing Schedule for all cases handled within that agency. The Master Hearing Schedule uses a rotation of four hearing officers assigned to regular dates, allowing that agency to schedule cases quickly and address emergency issues peculiar to the administrative due process needs of the agency. In 2011, the Department of Labor and Industry asked OGC to conduct hearings for a large number of backlogged cases usually heard by its non-attorney Unemployment Compensation Tax Review hearing officer and to train its new hearing officer. As noted earlier, the Department of Treasury contacted OGC to arrange for utilization of its Program after hearing about the Program's success. Despite the steady increase in referrals, a very high percentage of cases are completed within 30-60 days of the hearing date.

OGC has achieved its goal to centralize the utilization of hearing officers for many of the executive agencies that rely on hearing officers. Agencies are no longer reluctant to refer cases to in-house hearing officers and many prefer in-house hearing officers to outside hearing officers for cost and timeliness reasons. OGC has reduced the dependence of executive agencies on outside hearing officers, while still maintaining and increasing access to in-house hearing officers.



*Hearing Officer Report  
Cases Referred by Agency  
2003 - 3/31/2014\**

| <b>Agency</b>                                   | <b>Cases Referred for 2003 - 2014*</b> |
|---|--|
| Administration                                  | 5                                      |
| Agriculture                                     | 528                                    |
| Banking   | 108                                    |
| Board of Probation and Parole                   | 23                                     |
| Corrections                                     | 173                                    |
| DCED  | 1                                      |
| DCNR  | 1                                      |
| DEP   | 1                                      |
| Department of Corrections                       | 1                                      |
| Department of General Services                  | 3                                      |
| DMVA  | 13                                     |
| Education                                       | 294                                    |
| Education - State Charter School Appeal Board   | 1                                      |
| General Services                                | 6                                      |
| Health  | 297                                    |
| Insurance                                       | 1                                      |
| Labor and Industry                              | 356                                    |
| OGC   | 17                                     |
| PCCD  | 50                                     |
| PEMA  | 1                                      |
| Pennsylvania Municipal Retirement System        | 20                                     |
| Professional Standards and Practices Commission | 131                                    |
| PSERS   | 226                                    |
| Public Welfare                                  | 2                                      |
| SERS  | 176                                    |
| SSHE  | 27                                     |
| State   | 1                                      |
| State Police                                    | 294                                    |
| Transportation                                  | 1624                                   |
| Treasury  | 1                                      |
|   | <hr/>                                  |
|   | <b>Total Cases: 4382</b>               |

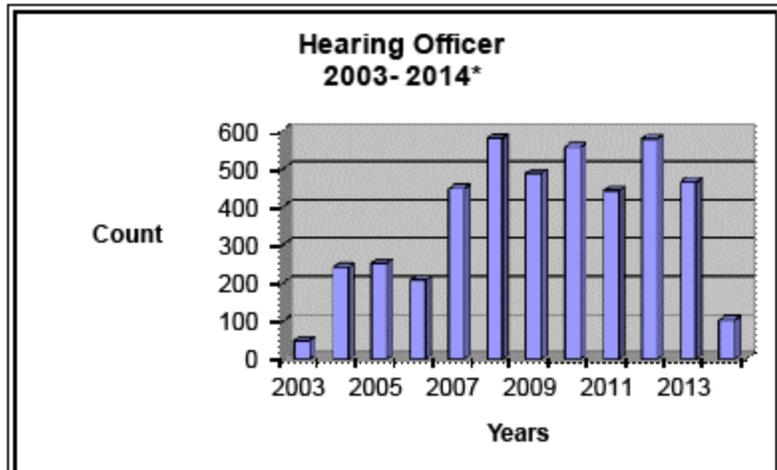
\*Total reflect actual cases filed, no projections for calendar year 2014 are included.



**Hearing Officer Report  
All Hearing Officers  
2003 - 3/31/2014\***

| <b>Fiscal Year</b> | <b>Hearing/Final Opinions</b> |
|--------------------|-------------------------------|
| 2003               | 44                            |
| 2004               | 221                           |
| 2005               | 251                           |
| 2006               | 208                           |
| 2007               | 447                           |
| 2008               | 580                           |
| 2009               | 487                           |
| 2010               | 556                           |
| 2011               | 442                           |
| 2012               | 578                           |
| 2013               | 463                           |
| 2014               | 103                           |

**Total Hearings/Final Opinions: 4,382**



\*2014 as of 3/31/2014