



Revising the Model State Administrative Procedure Act

Professor John L. Gedid spoke on the revision to the Model State Administrative Procedure Act (MSAPA) the National Conference of Commissioners on Uniform State Laws (NCCUSL) will make over the next few years. He has asked that we send our comments and suggestions to him so that he may take them to the revision meetings. This is an important opportunity for the members of ACR because revisions like this do not happen often. The last major revision was made in 1981. The text of the 1981 MSAPA is available [here in html](#) and [here in pdf](#).

In the future, Professor Gedid will inform us of the results of the revision meetings. More information on NCCUSL is available at www.nccusl.org.

Contact Professor [John L. Gedid](#)

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Model State Administrative Proc. Act 1981 Art. I

§ 1-101. [Short Title].

This Act may be cited as the [state] Administrative Procedure Act.

➡§ 1-102. [Definitions].

As used in this Act:

(1) "Agency" means a board, commission, department, officer, or other administrative unit of this State, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head. The term does not include the [legislature] or the courts [, or the governor] [, or the governor in the exercise of powers derived directly and exclusively from the constitution of this State]. The term does not include a political subdivision of the state or any of the administrative units of a political subdivision, but it does include a board, commission, department, officer, or other administrative unit created or appointed by joint or concerted action of an agency and one or more political subdivisions of the state or any of their units. To the extent it purports to exercise authority subject to any provision of this Act, an administrative unit otherwise qualifying as an "agency" must be treated as a separate agency even if the unit is located within or subordinate to another agency.

(2) "Agency action" means:

- (i) the whole or a part of a rule or an order;
- (ii) the failure to issue a rule or an order; or
- (iii) an agency's performance of, or failure to perform, any other duty, function, or activity, discretionary or otherwise.

(3) "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law.

(4) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.

(5) "Order" means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons. [The term does not include an "executive order" issued by the governor pursuant to Section 1-104 or 3-202.]

(6) "Party to agency proceedings," or "party" in context so indicating, means:

- (i) a person to whom the agency action is specifically directed; or
- (ii) a person named as a party to an agency proceeding or allowed to intervene or participate as a party in the proceeding.

(7) "Party to judicial review or civil enforcement proceedings," or "party" in context so indicating, means:

- (i) a person who files a petition for judicial review or civil enforcement or
- (ii) a person named as a party in a proceeding for judicial review or civil enforcement or allowed to participate as a party in the proceeding.

(8) "Person" means an individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency.

(9) "Provision of law" means the whole or a part of the federal or state constitution, or of any federal or state (i) statute, (ii) rule of court, (iii) executive order, or (iv) rule of an administrative agency.

(10) "Rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes (i) law or policy, or (ii) the organization, procedure, or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule.

(11) "Rule making" means the process for formulation and adoption of a rule.

§ 1-103. [Applicability and Relation to Other Law].

(a) This Act applies to all agencies and all proceedings not expressly exempted.

(b) This Act creates only procedural rights and imposes only procedural duties. They are in addition to those created and imposed by other statutes. To the extent that any other statute would diminish a right created or duty imposed by this Act, the other statute is superseded by this Act, unless the other statute expressly provides otherwise.

(c) An agency may grant procedural rights to persons in addition to those conferred by this Act so long as rights conferred upon other persons by any provision of law are not substantially prejudiced.

§ 1-104. [Suspension of Act's Provisions When Necessary to Avoid Loss of Federal Funds or Services].

(a) To the extent necessary to avoid a denial of funds or services from the United States which would otherwise be available to the state, the [governor by executive order] [attorney general by rule] [may] [shall] suspend, in whole or in part, one or more provisions of this Act. The [governor by executive order] [attorney general by rule] shall declare the termination of a suspension as soon as it is no longer necessary to prevent the loss of funds or services from the United States.

[(b) An executive order issued under subsection (a) is subject to the requirements applicable to the adoption and effectiveness of a rule.]

(c) If any provision of this Act is suspended pursuant to this section, the [governor] [attorney general] shall promptly report the suspension to the [legislature]. The report must include recommendations concerning any desirable legislation that may be necessary to conform this Act to federal law.]

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§ 1-105. [Waiver].

Except to the extent precluded by another provision of law, a person may waive any right conferred upon that person by this Act.

§ 1-106. [Informal Settlements].

Except to the extent precluded by another provision of law, informal settlement of matters that may make unnecessary more elaborate proceedings under this Act is encouraged. Agencies shall establish by rule specific procedures to facilitate informal settlement of matters. This section does not require any party or other person to settle a matter pursuant to informal procedures.

§ 1-107. [Conversion of Proceedings].

(a) At any point in an agency proceeding the presiding officer or other agency official responsible for the proceeding:

- (1) may convert the proceeding to another type of agency proceeding provided for by this Act if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of any party; and
- (2) if required by any provision of law, shall convert the proceeding to another type of agency proceeding provided for by this Act.

(b) A conversion of a proceeding of one type to a proceeding of another type may be effected only upon notice to all parties to the original proceeding.

(c) If the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be converted, that officer or official, in accordance with agency rules, shall secure the appointment of a successor to preside over or be responsible for the new proceeding.

(d) To the extent feasible and consistent with the rights of parties and the requirements of this Act pertaining to the new proceeding, the record of the original agency proceeding must be used in the new agency proceeding.

(e) After a proceeding is converted from one type to another, the presiding officer or other agency official responsible for the new proceeding shall:

(1) give such additional notice to parties or other persons as is necessary to satisfy the requirements of this Act pertaining to those proceedings;

(2) dispose of the matters involved without further proceedings if sufficient proceedings have already been held to satisfy the requirements of this Act pertaining to the new proceedings; and

(3) conduct or cause to be conducted any additional proceedings necessary to satisfy the requirements of this Act pertaining to those proceedings.

(f) Each agency shall adopt rules to govern the conversion of one type of proceeding to another. Those rules must include an enumeration of the factors to be considered in determining whether and under what circumstances one type of proceeding will be converted to another.

§ 1-108. [Effective Date].

This Act takes effect on [date] and does not govern proceedings pending on that date. This Act governs all agency proceedings, and all proceedings for judicial review or civil enforcement of agency action, commenced after that date. This Act also governs agency proceedings conducted on a remand from a court or another agency after the effective date of this Act.

§ 1-109. [Severability].

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are severable.

Model State Administrative Proc. Act 1981 Art. II

§ 2-101. [Administrative Rules Editor; Publication, Compilation, Indexing, and Public Inspection of Rules].

(a) There is created, within the executive branch, an [administrative rules editor]. The governor shall appoint the [administrative rules editor] who shall serve at the pleasure of the governor.

(b) Subject to the provisions of this Act, the [administrative rules editor] shall prescribe a uniform numbering system, form, and style for all proposed and adopted rules caused to be published by that office [, and shall have the same editing authority with respect to the publication of rules as the [reviser of statutes] has with respect to the publication of statutes].

(c) The [administrative rules editor] shall cause the [administrative bulletin] to be published in pamphlet form [once each week]. For purposes of calculating adherence to time requirements imposed by this Act, an issue of the [administrative bulletin] is deemed published on the later of the date indicated in that issue or the date of its mailing. The [administrative bulletin] must contain:

- (1) notices of proposed rule adoption prepared so that the text of the proposed rule shows the text of any existing rule proposed to be changed and the change proposed;
- (2) newly filed adopted rules prepared so that the text of the newly filed adopted rule shows the text of any existing rule being changed and the change being made;
- (3) any other notices and materials designated by [law] [the administrative rules editor] for publication therein; and
- (4) an index to its contents by subject.

(d) The [administrative rules editor] shall cause the [administrative code] to be compiled, indexed by subject, and published [in loose-leaf form]. All of the effective rules of each agency must be published and indexed in that publication. The [administrative rules editor] shall also cause [loose-leaf] supplements to the [administrative code] to be published at least every [3 months]. [The loose-leaf supplements must be in a form suitable for insertion in the appropriate places in the permanent [administrative code] compilation.]

(e) The [administrative rules editor] may omit from the [administrative bulletin or code] any proposed or filed adopted rule the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if:

- (1) knowledge of the rule is likely to be important to only a small class of persons;
- (2) on application to the issuing agency, the proposed or adopted rule in printed or processed form is made available at no more than its cost of reproduction; and
- (3) the [administrative bulletin or code] contains a notice stating in detail the specific subject matter of the omitted proposed or adopted rule and how a copy of the omitted material may be obtained.

(f) The [administrative bulletin and administrative code] must be furnished to [designated officials] without charge and to all subscribers at a cost to be determined by the [administrative rules editor]. Each agency shall also make available for public inspection and copying those portions of the [administrative bulletin and administrative code] containing all rules adopted or used by the agency in the discharge of its functions, and the index to those rules.

(g) Except as otherwise required by a provision of law, subsections (c) through (f) do not apply to rules governed by Section 3-116, and the following provisions apply instead:

- (1) Each agency shall maintain an official, current, and dated compilation that is indexed by subject, containing all of its rules within the scope of Section 3-116. Each addition to,

change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. Except for those portions containing rules governed by Section 3-116(2), the compilation must be made available for public inspection and copying. Certified copies of the full compilation must also be furnished to the [secretary of state, the administrative rules counsel, and members of the administrative rules review committee], and be kept current by the agency at least every [30] days. (2) A rule subject to the requirements of this subsection may not be relied on by an agency to the detriment of any person who does not have actual, timely knowledge of the contents of the rule until the requirements of paragraph (1) are satisfied. The burden of proving that knowledge is on the agency. This provision is also inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

§ 2-102. [Public Inspection and Indexing of Agency Orders].

(a) In addition to other requirements imposed by any provision of law, each agency shall make all written final orders available for public inspection and copying and index them by name and subject. An agency shall delete from those orders identifying details to the extent required by any provision of law [or necessary to prevent a clearly unwarranted invasion of privacy or release of trade secrets]. In each case the justification for the deletion must be explained in writing and attached to the order.

(b) A written final order may not be relied on as precedent by an agency to the detriment of any person until it has been made available for public inspection and indexed in the manner described in subsection (a). This provision is inapplicable to any person who has actual timely knowledge of the order. The burden of proving that knowledge is on the agency.

§ 2-103. [Declaratory Orders].

(a) Any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency. An agency shall issue a declaratory order in response to a petition for that order unless the agency determines that issuance of the order under the circumstances would be contrary to a rule adopted in accordance with subsection (b). However, an agency may not issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

(b) Each agency shall issue rules that provide for: (i) the form, contents, and filing of petitions for declaratory orders; (ii) the procedural rights of persons in relation to the petitions and (iii) the disposition of the petitions. Those rules must describe the classes of circumstances in which the agency will not issue a declaratory order and must be consistent with the public interest and with the general policy of this Act to facilitate and encourage agency issuance of reliable advice.

(c) Within [15] days after receipt of a petition for a declaratory order, an agency shall give notice of the petition to all persons to whom notice is required by any provision of law and may give notice to any other persons.

(d) Persons who qualify under Section 4-209(a)(2) and (3) and file timely petitions for intervention according to agency rules may intervene in proceedings for declaratory orders. Other provisions of Article IV apply to agency proceedings for declaratory orders only to the extent an agency so provides by rule or order.

(e) Within [30] days after receipt of a petition for a declaratory order an agency, in writing, shall:

- (1) issue an order declaring the applicability of the statute, rule, or order in question to the specified circumstances;
- (2) set the matter for specified proceedings;
- (3) agree to issue a declaratory order by a specified time; or
- (4) decline to issue a declaratory order, stating the reasons for its action.

(f) A copy of all orders issued in response to a petition for a declaratory order must be mailed promptly to petitioner and any other parties.

(g) A declaratory order has the same status and binding effect as any other order issued in an agency adjudicative proceeding. A declaratory order must contain the names of all parties to the proceeding on which it is based, the particular facts on which it is based, and the reasons for its conclusion.

(h) If an agency has not issued a declaratory order within [60] days after receipt of a petition therefor, the petition is deemed to have been denied.

§ 2-104. [Required Rule Making].

In addition to other rule-making requirements imposed by law, each agency shall:

- (1) adopt as a rule a description of the organization of the agency which states the general course and method of its operations and where and how the public may obtain information or make submissions or requests;
- (2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available to the public, including a description of all forms and instructions that are to be used by the public in dealing with the agency; [and]
- (3) as soon as feasible and to the extent practicable, adopt rules, in addition to those otherwise required by this Act, embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers [; and] [.]
- [(4) as soon as feasible and to the extent practicable, adopt rules to supersede principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases.]

§ 2-105. [Model Rules of Procedure].

In accordance with the rule-making requirements of this Act, the [attorney general] shall adopt model rules of procedure appropriate for use by as many agencies as possible. The model rules must deal with all general functions and duties performed in common by several agencies. Each agency shall adopt as much of the model rules as is practicable under its circumstances. To the extent an agency adopts the model rules, it shall do so in accordance with the rule-making requirements of this Act. Any agency adopting a rule of

procedure that differs from the model rules shall include in the rule a finding stating the reasons why the relevant portions of the model rules were impracticable under the circumstances.

Model State Administrative Proc. Act 1981 Art. III

ARTICLE III. CHAPTER I. ADOPTION AND EFFECTIVENESS OF RULES

§ 3-101. [Advice on Possible Rules before Notice of Proposed Rule Adoption].

(a) In addition to seeking information by other methods, an agency, before publication of a notice of proposed rule adoption under Section 3-103, may solicit comments from the public on a subject matter of possible rule making under active consideration within the agency by causing notice to be published in the [administrative bulletin] of the subject matter and indicating where, when, and how persons may comment.

(b) Each agency may also appoint committees to comment, before publication of a notice of proposed rule adoption under Section 3-103, on the subject matter of a possible rule making under active consideration within the agency. The membership of those committees must be published at least [annually] in the [administrative bulletin].

§ 3-102. [Public Rule-making Docket].

(a) Each agency shall maintain a current, public rule-making docket.

(b) The rule-making docket [must] [may] contain a listing of the precise subject matter of each possible rule currently under active consideration within the agency for proposal under Section 3-103, the name and address of agency personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the agency of that possible rule.

(c) The rule-making docket must list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced, by publication of a notice of proposed rule adoption, to the time it is terminated, by publication of a notice of termination or the rule becoming effective. For each rule-making proceeding, the docket must indicate:

- (1) the subject matter of the proposed rule;
- (2) a citation to all published notices relating to the proceeding;
- (3) where written submissions on the proposed rule may be inspected;
- (4) the time during which written submissions may be made;
- (5) the names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made;
- (6) whether a written request for the issuance of a regulatory analysis of the proposed rule has been filed, whether that analysis has been issued, and where the written request and analysis may be inspected;
- (7) the current status of the proposed rule and any agency determinations with respect thereto;

- (8) any known timetable for agency decisions or other action in the proceeding;
- (9) the date of the rule's adoption;
- (10) the date of the rule's filing, indexing, and publication; and
- (11) when the rule will become effective.

§ 3-103. [Notice of Proposed Rule Adoption].

(a) At least [30] days before the adoption of a rule an agency shall cause notice of its contemplated action to be published in the [administrative bulletin]. The notice of proposed rule adoption must include:

- (1) a short explanation of the purpose of the proposed rule;
- (2) the specific legal authority authorizing the proposed rule;
- (3) subject to Section 2-101(e), the text of the proposed rule;
- (4) where, when, and how persons may present their views on the proposed rule; and
- (5) where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

(b) Within [3] days after its publication in the [administrative bulletin], the agency shall cause a copy of the notice of proposed rule adoption to be mailed to each person who has made a timely request to the agency for a mailed copy of the notice. An agency may charge persons for the actual cost of providing them with mailed copies.

§ 3-104. [Public Participation].

(a) For at least [30] days after publication of the notice of proposed rule adoption, an agency shall afford persons the opportunity to submit in writing, argument, data, and views on the proposed rule.

(b)(1) An agency shall schedule an oral proceeding on a proposed rule if, within [20] days after the published notice of proposed rule adoption, a written request for an oral proceeding is submitted by [the administrative rules review committee,] [the administrative rules counsel,] a political subdivision, an agency, or [25] persons. At that proceeding, persons may present oral argument, data, and views on the proposed rule.

(2) An oral proceeding on a proposed rule, if required, may not be held earlier than [20] days after notice of its location and time is published in the [administrative bulletin].

(3) The agency, a member of the agency, or another presiding officer designated by the agency, shall preside at a required oral proceeding on a proposed rule. If the agency does not preside, the presiding official shall prepare a memorandum for consideration by the agency summarizing the contents of the presentations made at the oral proceeding. Oral proceedings must be open to the public and be recorded by stenographic or other means.

(4) Each agency shall issue rules for the conduct of oral rule-making proceedings. Those rules may include provisions calculated to prevent undue repetition in the oral proceedings.

§ 3-105. [Regulatory Analysis].

(a) An agency shall issue a regulatory analysis of a proposed rule if, within [20] days after the published notice of proposed rule adoption, a written request for the analysis is filed in the office of the [secretary of state] by [the administrative rules review committee, the governor, a political subdivision, an agency, or [300] persons signing the request]. The [secretary of state] shall immediately forward to the agency a certified copy of the filed request.

(b) Except to the extent that the written request expressly waives one or more of the following, the regulatory analysis must contain:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons;
- (3) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (4) a comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction;
- (5) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule; and
- (6) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

(c) Each regulatory analysis must include quantification of the data to the extent practicable and must take account of both short-term and long-term consequences.

(d) A concise summary of the regulatory analysis must be published in the [administrative bulletin] at least [10] days before the earliest of:

- (1) the end of the period during which persons may make written submissions on the proposed rule;
- (2) the end of the period during which an oral proceeding may be requested; or
- (3) the date of any required oral proceeding on the proposed rule.

(e) The published summary of the regulatory analysis must also indicate where persons may obtain copies of the full text of the regulatory analysis and where, when, and how persons may present their views on the proposed rule and demand an oral proceeding thereon if one is not already provided.

(f) If the agency has made a good faith effort to comply with the requirements of subsections (a) through (c), the rule may not be invalidated on the ground that the contents of the regulatory analysis are insufficient or inaccurate.

§ 3-106. [Time and Manner of Rule Adoption].

(a) An agency may not adopt a rule until the period for making written submissions and oral presentations has expired.

(b) Within [180] days after the later of (i) the publication of the notice of proposed rule adoption, or (ii) the end of oral proceedings thereon, an agency shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the [administrative bulletin].

(c) Before the adoption of a rule, an agency shall consider the written submissions, oral submissions or any memorandum summarizing oral submissions, and any regulatory analysis, provided for by this Chapter.

(d) Within the scope of its delegated authority, an agency may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

§ 3-107. [Variance between Adopted Rule and Published Notice of Proposed Rule Adoption].

(a) An agency may not adopt a rule that is substantially different from the proposed rule contained in the published notice of proposed rule adoption. However, an agency may terminate a rule-making proceeding and commence a new rule-making proceeding for the purpose of adopting a substantially different rule.

(b) In determining whether an adopted rule is substantially different from the published proposed rule upon which it is required to be based, the following must be considered:

- (1) the extent to which all persons affected by the adopted rule should have understood that the published proposed rule would affect their interests;
- (2) the extent to which the subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule; and
- (3) the extent to which the effects of the adopted rule differ from the effects of the published proposed rule had it been adopted instead.

§ 3-108. [General Exemption from Public Rule-making Procedures].

(a) To the extent an agency for good cause finds that any requirements of Sections 3-103 through 3-107 are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, those requirements do not apply. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subsection.

(b) In an action contesting a rule adopted under subsection (a), the burden is upon the agency to demonstrate that any omitted requirements of Sections 3- 103 through 3-107 were impracticable, unnecessary, or contrary to the public interest in the particular circumstances involved.

(c) Within [2] years after the effective date of a rule adopted under subsection (a), the [administrative rules review committee or the governor] may request the agency to hold a rule-making proceeding thereon according to the requirements of Sections 3-103 through 3-107. The request must be in writing and filed in the office of the [secretary of state]. The [secretary of state] shall immediately forward to the agency and to the

[administrative rules editor] a certified copy of the request. Notice of the filing of the request must be published in the next issue of the [administrative bulletin]. The rule in question ceases to be effective [180] days after the request is filed. However, an agency, after the filing of the request, may subsequently adopt an identical rule in a rule-making proceeding conducted pursuant to the requirements of Sections 3-103 through 3-107.

§ 3-109. [Exemption for Certain Rules].

(a) An agency need not follow the provisions of Sections 3-103 through 3-108 in the adoption of a rule that only defines the meaning of a statute or other provision of law or precedent if the agency does not possess delegated authority to bind the courts to any extent with its definition. A rule adopted under this subsection must include a statement that it was adopted under this subsection when it is published in the [administrative bulletin], and there must be an indication to that effect adjacent to the rule when it is published in the [administrative code].

(b) A reviewing court shall determine wholly de novo the validity of a rule within the scope of subsection (a) that is adopted without complying with the provisions of Sections 3-103 through 3-108.

§ 3-110. [Concise Explanatory Statement].

(a) At the time it adopts a rule, an agency shall issue a concise explanatory statement containing:

- (1) its reasons for adopting the rule; and
- (2) an indication of any change between the text of the proposed rule contained in the published notice of proposed rule adoption and the text of the rule as finally adopted, with the reasons for any change.

(b) Only the reasons contained in the concise explanatory statement may be used by any party as justifications for the adoption of the rule in any proceeding in which its validity is at issue.

§ 3-111. [Contents, Style, and Form of Rule].

(a) Each rule adopted by an agency must contain the text of the rule and:

- (1) the date the agency adopted the rule;
- (2) a concise statement of the purpose of the rule;
- (3) a reference to all rules repealed, amended, or suspended by the rule;
- (4) a reference to the specific statutory or other authority authorizing adoption of the rule;
- (5) any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule; and
- (6) the effective date of the rule if other than that specified in Section 3-115(a).

[(b) To the extent feasible, each rule should be written in clear and concise language understandable to persons who may be affected by it.]

(c) An agency may incorporate, by reference in its rules and without publishing the incorporated matter in full, all or any part of a code, standard, rule, or regulation that has been adopted by an agency of the United States or of this state, another state, or by a nationally recognized organization or association, if incorporation of its text in agency rules would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the agency rules must fully identify the incorporated matter by location, date, and otherwise, [and must state that the rule does not include any later amendments or editions of the incorporated matter]. An agency may incorporate by reference such matter in its rules only if the agency, organization, or association originally issuing that matter makes copies of it readily available to the public. The rules must state where copies of the incorporated matter are available at cost from the agency issuing the rule, and where copies are available from the agency of the United States, this State, another state, or the organization or association originally issuing that matter.

(d) In preparing its rules pursuant to this Chapter, each agency shall follow the uniform numbering system, form, and style prescribed by the [administrative rules editor].

§ 3-112. [Agency Rule-making Record].

(a) An agency shall maintain an official rule-making record for each rule it (i) proposes by publication in the [administrative bulletin] of a notice of proposed rule adoption, or (ii) adopts. The record and materials incorporated by reference must be available for public inspection.

(b) The agency rule-making record must contain:

- (1) copies of all publications in the [administrative bulletin] with respect to the rule or the proceeding upon which the rule is based;
- (2) copies of any portions of the agency's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;
- (3) all written petitions, requests, submissions, and comments received by the agency and all other written materials considered by the agency in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based;
- (4) any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, any tape recording or stenographic record of those presentations, and any memorandum prepared by a presiding official summarizing the contents of those presentations;
- (5) a copy of any regulatory analysis prepared for the proceeding upon which the rule is based;
- (6) a copy of the rule and explanatory statement filed in the office of the [secretary of state];
- (7) all petitions for exceptions to, amendments of, or repeal or suspension of, the rule;
- (8) a copy of any request filed pursuant to Section 3-108(c);
- [(9) a copy of any objection to the rule filed by the [administrative rules review committee] pursuant to Section 3-204(d) and the agency's response;] and
- (10) a copy of any filed executive order with respect to the rule.

(c) Upon judicial review, the record required by this section constitutes the official agency rule-making record with respect to a rule. Except as provided in Section 3-110(b) or otherwise required by a provision of law, the agency rule-making record need not constitute the exclusive basis for agency action on that rule or for judicial review thereof.

§ 3-113. [Invalidity of Rules Not Adopted According to Chapter; Time Limitation].

(a) A rule adopted after [date] is invalid unless adopted in substantial compliance with the provisions of Sections 3-102 through 3-108 and Sections 3-110 through 3-112. However, inadvertent failure to mail a notice of proposed rule adoption to any person as required by Section 3- 103(b) does not invalidate a rule.

(b) An action to contest the validity of a rule on the grounds of its noncompliance with any provision of Sections 3-102 through 3-108 or Sections 3-110 through 3-112 must be commenced within [2] years after the effective date of the rule.

§ 3-114. [Filing of Rules].

(a) An agency shall file in the office of the [secretary of state] each rule it adopts and all rules existing on the effective date of this Act that have not previously been filed. The filing must be done as soon after adoption of the rule as is practicable. At the time of filing, each rule adopted after the effective date of this Act must have attached to it the explanatory statement required by Section 3-110. The [secretary of state] shall affix to each rule and statement a certification of the time and date of filing and keep a permanent register open to public inspection of all filed rules and attached explanatory statements. In filing a rule, each agency shall use a standard form prescribed by the [secretary of state].

(b) The [secretary of state] shall transmit to the [administrative rules editor], [administrative rules counsel], and to the members of the [administrative rules review committee] a certified copy of each filed rule as soon after its filing as is practicable.

§ 3-115. [Effective Date of Rules].

(a) Except to the extent subsection (b) or (c) provides otherwise, each rule adopted after the effective date of this Act becomes effective [30] days after the later of (i) its filing in the office of the [secretary of state] or (ii) its publication and indexing in the [administrative bulletin].

(b)(1) A rule becomes effective on a date later than that established by subsection (a) if a later date is required by another statute or specified in the rule.

(2) A rule may become effective immediately upon its filing or on any subsequent date earlier than that established by subsection (a) if the agency establishes such an effective date and finds that:

- (i) it is required by constitution, statute, or court order;
- (ii) the rule only confers a benefit or removes a restriction on the public or some segment thereof;
- (iii) the rule only delays the effective date of another rule that is not yet effective; or
- (iv) the earlier effective date is necessary because of imminent peril to the public health, safety, or welfare.

(3) The finding and a brief statement of the reasons therefor required by paragraph (2) must be made a part of the rule. In any action contesting the effective date of a rule made effective under paragraph (2), the burden is on the agency to justify its finding.

(4) Each agency shall make a reasonable effort to make known to persons who may be affected by it a rule made effective before publication and indexing under this subsection.

(c) This section does not relieve an agency from compliance with any provision of law requiring that some or all of its rules be approved by other

§ 3-116. [Special Provision for Certain Classes of Rules].

Except to the extent otherwise provided by any provision of law, Sections 3- 102 through 3-115 are inapplicable to:

(1) a rule concerning only the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public;

(2) a rule that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if disclosure of the criteria or guidelines would:

(i) enable law violators to avoid detection;

(ii) facilitate disregard of requirements imposed by law; or

(iii) give a clearly improper advantage to persons who are in an adverse position to the state;

(3) a rule that only establishes specific prices to be charged for particular goods or services sold by an agency;

(4) a rule concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property;

(5) a rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property;

(6) a rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital;

(7) a form whose contents or substantive requirements are prescribed by rule or statute, and instructions for the execution or use of the form;

(8) an agency budget; [or]

(9) an opinion of the attorney general [; or] [.]

(10) [the terms of a collective bargaining agreement.]

§ 3-117. [Petition For Adoption of Rule].

Any person may petition an agency requesting the adoption of a rule. Each agency shall prescribe by rule the form of the petition and the procedure for its submission, consideration, and disposition. Within [60] days after submission of a petition, the agency shall either (i) deny the petition in writing, stating its reasons therefor, (ii) initiate rule-making proceedings in accordance with this Chapter, or (iii) if otherwise lawful, adopt a rule.

ARTICLE III. CHAPTER II. REVIEW OF AGENCY RULES

§ 3-201. [Review by Agency].

At least [annually], each agency shall review all of its rules to determine whether any new rule should be adopted. In conducting that review, each agency shall prepare a written report summarizing its findings, its supporting reasons, and any proposed course of action. For each rule, the [annual] report must include, at least once every [7] years, a concise statement of:

- (1) the rule's effectiveness in achieving its objectives, including a summary of any available data supporting the conclusions reached;
 - (2) criticisms of the rule received during the previous [7] years, including a summary of any petitions for waiver of the rule tendered to the agency or granted by it; and
 - (3) alternative solutions to the criticisms and the reasons they were rejected or the changes made in the rule in response to those criticisms and the reasons for the changes.
- A copy of the [annual] report must be sent to the [administrative rules review committee and the administrative rules counsel] and be available for public inspection.

[§ 3-202. [Review by Governor; Administrative Rules Counsel].

(a) To the extent the agency itself would have authority, the governor may rescind or suspend all or a severable portion of a rule of an agency. In exercising this authority, the governor shall act by an executive order that is subject to the provisions of this Act applicable to the adoption and effectiveness of a rule.

(b) The governor may summarily terminate any pending rule-making proceeding by an executive order to that effect, stating therein the reasons for the action. The executive order must be filed in the office of the [secretary of state], which shall promptly forward a certified copy to the agency and the [administrative rules editor]. An executive order terminating a rule-making proceeding becomes effective on [the date it is filed] and must be published in the next issue of the [administrative bulletin].

(c) There is created, within the office of the governor, an [administrative rules counsel] to advise the governor in the execution of the authority vested under this Article. The governor shall appoint the [administrative rules counsel] who shall serve at the pleasure of the governor.]

[§ 3-203. [Administrative Rules Review Committee].

There is created the ["administrative rules review committee"] of the [legislature]. The committee must be [bipartisan] and composed of [3] senators appointed by the [president of the senate] and [3] representatives appointed by the [speaker of the house]. Committee members must be appointed within [30] days after the convening of a regular legislative session. The term of office is [2] years while a member of the [legislature] and begins on the date of appointment to the committee. While a member of the [legislature], a member of the committee whose term has expired shall serve until a successor is appointed. A vacancy on the committee may be filled at any time by the original appointing authority for the remainder of the term. The committee shall choose a chairman from its membership for a [2]-year term and may employ staff it considers

advisable.]

§ 3-204. [Review by Administrative Rules Review Committee].

(a) The [administrative rules review committee] shall selectively review possible, proposed, or adopted rules and prescribe appropriate committee procedures for that purpose. The committee may receive and investigate complaints from members of the public with respect to possible, proposed, or adopted rules and hold public proceedings on those complaints.

(b) Committee meetings must be open to the public. Subject to procedures established by the committee, persons may present oral argument, data, or views at those meetings. The committee may require a representative of an agency whose possible, proposed, or adopted rule is under examination to attend a committee meeting and answer relevant questions. The committee may also communicate to the agency its comments on any possible, proposed, or adopted rule and require the agency to respond to them in writing. Unless impracticable, in advance of each committee meeting notice of the time and place of the meeting and the specific subject matter to be considered must be published in the [administrative bulletin].

(c) The committee may recommend enactment of a statute to improve the operation of an agency. The committee may also recommend that a particular rule be superseded in whole or in part by statute. The [speaker of the house and the president of the senate] shall refer those recommendations to the appropriate standing committees. This subsection does not preclude any committee of the legislature from reviewing a rule on its own motion or recommending that it be superseded in whole or in part by statute.

[(d)(1) If the committee objects to all or some portion of a rule because the committee considers it to be beyond the procedural or substantive authority delegated to the adopting agency, the committee may file that objection in the office of the [secretary of state]. The filed objection must contain a concise statement of the committee's reasons for its action.]

(2) The [secretary of state] shall affix to each objection a certification of the date and time of its filing and as soon thereafter as practicable shall transmit a certified copy thereof to the agency issuing the rule in question, the [administrative rules editor, and the administrative rules counsel]. The [secretary of state] shall also maintain a permanent register open to public inspection of all objections by the committee.

(3) The [administrative rules editor] shall publish and index an objection filed pursuant to this subsection in the next issue of the [administrative bulletin] and indicate its existence adjacent to the rule in question when that rule is published in the [administrative code]. In case of a filed objection by the committee to a rule that is subject to the requirements of Section 2- 101(g), the agency shall indicate the existence of that objection adjacent to the rule in the official compilation referred to in that subsection.

(4) Within [14] days after the filing of an objection by the committee to a rule, the issuing agency shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

[(5) After the filing of an objection by the committee that is not subsequently withdrawn, the burden is upon the agency in any proceeding for judicial review or for enforcement of the rule to establish that the whole or portion of the rule objected to is within the procedural and substantive authority delegated to the agency.]

(6) The failure of the [administrative rules review committee] to object to a rule is not an implied legislative authorization of its procedural or substantive validity.]

(e) The committee may recommend to an agency that it adopt a rule. [The committee may also require an agency to publish notice of the committee's recommendation as a proposed rule of the agency and to allow public participation thereon, according to the provisions of Sections 3-103 through 3-104. An agency is not required to adopt the proposed rule.]

(f) The committee shall file an annual report with the [presiding officer] of each house and the governor.

ARTICLE IV. ADJUDICATIVE PROCEEDINGS

ARTICLE IV. CHAPTER I. AVAILABILITY OF ADJUDICATIVE PROCEEDINGS; APPLICATIONS; LICENSES

§ 4-101. [Adjudicative Proceedings; When Required; Exceptions].

(a) An agency shall conduct an adjudicative proceeding as the process for formulating and issuing an order, unless the order is a decision:

- (1) to issue or not to issue a complaint, summons, or similar accusation;
- (2) to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court; or
- (3) under Section 4-103, not to conduct an adjudicative proceeding.

(b) This Article applies to rule-making proceedings only to the extent that another statute expressly so requires.

§ 4-102. [Adjudicative Proceedings; Commencement].

(a) An agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.

(b) An agency shall commence an adjudicative proceeding upon the application of any person, unless:

- (1) the agency lacks jurisdiction of the subject matter;
- (2) resolution of the matter requires the agency to exercise discretion within the scope of Section 4-101(a);

- (3) a statute vests the agency with discretion to conduct or not to conduct an adjudicative proceeding before issuing an order to resolve the matter and, in the exercise of that discretion, the agency has determined not to conduct an adjudicative proceeding;
- (4) resolution of the matter does not require the agency to issue an order that determines the applicant's legal rights, duties, privileges, immunities, or other legal interests;
- (5) the matter was not timely submitted to the agency; or
- (6) the matter was not submitted in a form substantially complying with any applicable provision of law.

(c) An application for an agency to issue an order includes an application for the agency to conduct appropriate adjudicative proceedings, whether or not the applicant expressly requests those proceedings.

(d) An adjudicative proceeding commences when the agency or a presiding officer:

- (1) notifies a party that a pre-hearing conference, hearing, or other stage of an adjudicative proceeding will be conducted; or
- (2) begins to take action on a matter that appropriately may be determined by an adjudicative proceeding, unless this action is:
 - (i) an investigation for the purpose of determining whether an adjudicative proceeding should be conducted; or
 - (ii) a decision which, under Section 4-101(a), the agency may make without conducting an adjudicative proceeding.

§ 4-103. [Decision Not to Conduct Adjudicative Proceeding].

If an agency decides not to conduct an adjudicative proceeding in response to an application, the agency shall furnish the applicant a copy of its decision in writing, with a brief statement of the agency's reasons and of any administrative review available to the applicant.

§ 4-104. [Agency Action on Applications].

(a) Except to the extent that the time limits in this subsection are inconsistent with limits established by another statute for any stage of the proceedings, an agency shall process an application for an order, other than a declaratory order, as follows:

- (1) Within [30] days after receipt of the application, the agency shall examine the application, notify the applicant of any apparent errors or omissions, request any additional information the agency wishes to obtain and is permitted by law to require, and notify the applicant of the name, official title, mailing address and telephone number of an agency member or employee who may be contacted regarding the application.
- (2) Except in situations governed by paragraph (3), within [90] days after receipt of the application or of the response to a timely request made by the agency pursuant to paragraph (1), the agency shall:
 - (i) approve or deny the application, in whole or in part, on the basis of emergency or summary adjudicative proceedings, if those proceedings are available under this Act for disposition of the matter;
 - (ii) commence a formal adjudicative hearing or a conference adjudicative hearing in accordance with this Act; or
 - (iii) dispose of the application in accordance with Section 4-103.

(3) If the application pertains to subject matter that is not available when the application is filed but may be available in the future, including an application for housing or employment at a time no vacancy exists, the agency may proceed to make a determination of eligibility within the time provided in paragraph (2). If the agency determines that the applicant is eligible, the agency shall maintain the application on the agency's list of eligible applicants as provided by law and, upon request, shall notify the applicant of the status of the application.

(b) If a timely and sufficient application has been made for renewal of a license with reference to any activity of a continuing nature, the existing license does not expire until the agency has taken final action upon the application for renewal or, if the agency's action is unfavorable, until the last day for seeking judicial review of the agency's action or a later date fixed by the reviewing court.

§ 4-105. [Agency Action Against Licensees].

An agency may not revoke, suspend, modify, annul, withdraw, or amend a license unless the agency first gives notice and an opportunity for an appropriate adjudicative proceeding in accordance with this Act or other statute. This section does not preclude an agency from (i) taking immediate action to protect the public interest in accordance with Section 4-501 or (ii) adopting rules, otherwise within the scope of its authority, pertaining to a class of licensees, including rules affecting the existing licenses of a class of licensees.

ARTICLE IV. CHAPTER II. FORMAL ADJUDICATIVE HEARING

§ 4-201. [Applicability].

An adjudicative proceeding is governed by this chapter, except as otherwise provided by:

- (1) a statute other than this Act;
- (2) a rule that adopts the procedures for the conference adjudicative hearing or summary adjudicative proceeding in accordance with the standards provided in this Act for those proceedings;
- (3) Section 4-501 pertaining to emergency adjudicative proceedings; or
- (4) Section 2-103 pertaining to declaratory proceedings.

§ 4-202. [Presiding Officer, Disqualification, Substitution].

(a) The agency head, one or more members of the agency head, one or more administrative law judges assigned by the office of administrative hearings in accordance with Section 4-301 [, or, unless prohibited by law, one or more other persons designated by the agency head], in the discretion of the agency head, may be the presiding officer.

(b) Any person serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this Act or for which a judge is or may be disqualified.

(c) Any party may petition for the disqualification of a person promptly after receipt of notice indicating that the person will preside or promptly upon discovering facts establishing grounds for disqualification, whichever is later.

(d) A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

(e) If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, the substitute must be appointed by:

- (1) the governor, if the disqualified or unavailable person is an elected official; or
- (2) the appointing authority, if the disqualified or unavailable person is an appointed official.

(f) Any action taken by a duly-appointed substitute for a disqualified or unavailable person is as effective as if taken by the latter.

§ 4-203. [Representation].

(a) Any party may participate in the hearing in person or, if the party is a corporation or other artificial person, by a duly authorized representative.

(b) Whether or not participating in person, any party may be advised and represented at the party's own expense by counsel or, if permitted by law, other representative.

§ 4-204. [Pre-hearing Conference--Availability, Notice].

The presiding officer designated to conduct the hearing may determine, subject to the agency's rules, whether a pre-hearing conference will be conducted. If the conference is conducted:

(1) The presiding officer shall promptly notify the agency of the determination that a pre-hearing conference will be conducted. The agency shall assign or request the office of administrative hearings to assign a presiding officer for the pre-hearing conference, exercising the same discretion as is provided by Section 4-202 concerning the selection of a presiding officer for a hearing.

(2) The presiding officer for the pre-hearing conference shall set the time and place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The agency shall give notice to other persons entitled to notice under any provision of law.

(3) The notice must include:

- (i) the names and mailing addresses of all parties and other persons to whom notice is being given by the presiding officer;
- (ii) the name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the agency;
- (iii) the official file or other reference number, the name of the proceeding, and a general description of the subject matter;
- (iv) a statement of the time, place, and nature of the pre-hearing conference;
- (v) a statement of the legal authority and jurisdiction under which the pre-hearing conference and the hearing are to be held;
- (vi) the name, official title, mailing address and telephone number of the presiding officer for the pre-hearing conference;

(vii) a statement that at the pre-hearing conference the proceeding, without further notice, may be converted into a conference adjudicative hearing or a summary adjudicative proceeding for disposition of the matter as provided by this Act; and
(viii) a statement that a party who fails to attend or participate in a pre-hearing conference, hearing, or other state of an adjudicative proceeding may be held in default under this Act.

(4) The notice may include any other matter that the presiding officer considers desirable to expedite the proceedings.

§ 4-205. [Pre-hearing Conference--Procedure and Pre-hearing Order].

(a) The presiding officer may conduct all or part of the pre-hearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

(b) The presiding officer shall conduct the pre-hearing conference, as may be appropriate, to deal with such matters as conversion of the proceeding to another type, exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form, and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, discovery orders and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The presiding officer shall issue a pre-hearing order incorporating the matters determined at the pre-hearing conference.

(c) If a pre-hearing conference is not held, the presiding officer for the hearing may issue a pre-hearing order, based on the pleadings, to regulate the conduct of the proceedings.

§ 4-206. [Notice of Hearing].

(a) The presiding officer for the hearing shall set the time and place of the hearing and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter.

(b) The notice must include a copy of any pre-hearing order rendered in the matter.

(c) To the extent not included in a pre-hearing order accompanying it, the notice must include:

- (1) the names and mailing addresses of all parties and other persons to whom notice is being given by the presiding officer;
- (2) the name, official title, mailing address and telephone number of any counsel or employee who has been designated to appear for the agency;
- (3) the official file or other reference number, the name of the proceeding, and a general description of the subject matter;
- (4) a statement of the time, place, and nature of the hearing;

- (5) a statement of the legal authority and jurisdiction under which the hearing is to be held;
- (6) the name, official title, mailing address, and telephone number of the presiding officer;
- (7) a statement of the issues involved and, to the extent known to the presiding officer, of the matters asserted by the parties; and
- (8) a statement that a party who fails to attend or participate in a pre-hearing conference, hearing, or other stage of an adjudicative proceeding may be held in default under this Act.

(d) The notice may include any other matters the presiding officer considers desirable to expedite the proceedings.

(e) The agency shall give notice to persons entitled to notice under any provision of law who have not been given notice by the presiding officer. Notice under this subsection may include all types of information provided in subsections (a) through (d) or may consist of a brief statement indicating the subject matter, parties, time, place, and nature of the hearing, manner in which copies of the notice to the parties may be inspected and copied, and name and telephone number of the presiding officer.

§ 4-207. [Pleadings, Briefs, Motions, Service].

(a) The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, motions, objections and offers of settlement.

(b) The presiding officer, at appropriate stages of the proceedings, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed initial or final orders.

(c) A party shall serve copies of any filed item on all parties, by mail or any other means prescribed by agency rule.

§ 4-208. [Default].

(a) If a party fails to attend or participate in a pre-hearing conference, hearing, or other stage of an adjudicative proceeding, the presiding officer may serve upon all parties written notice of a proposed default order, including a statement of the grounds.

(b) Within [7] days after service of a proposed default order, the party against whom it was issued may file a written motion requesting that the proposed default order be vacated and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the presiding officer may adjourn the proceedings or conduct them without the participation of the party against whom a proposed default order was issued, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings.

(c) The presiding officer shall either issue or vacate the default order promptly after expiration of the time within which the party may file a written motion under subsection (b).

(d) After issuing a default order, the presiding officer shall conduct any further proceedings necessary to complete the adjudication without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party.

§ 4-209. [Intervention].

(a) The presiding officer shall grant a petition for intervention if:

(1) the petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least [3] days before the hearing;

(2) the petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervener under any provision of law; and

(3) the presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

(b) The presiding officer may grant a petition for intervention at any time, upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

(c) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervener's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

(1) limiting the intervener's participation to designated issues in which the intervener has a particular interest demonstrated by the petition;

(2) limiting the intervener's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(3) requiring 2 or more interveners to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

(d) The presiding officer, at least [24 hours] before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

§ 4-210. [Subpoenas, Discovery and Protective Orders].

(a) The presiding officer [at the request of any party shall, and upon the presiding officer's own motion,] may issue subpoenas, discovery orders and protective orders, in accordance with the rules of civil procedure.

(b) Subpoenas and orders issued under this section may be enforced pursuant to the provisions of this Act on civil enforcement of agency action.

§ 4-211. [Procedure at Hearing].

At a hearing:

(1) The presiding officer shall regulate the course of the proceedings in conformity with any pre-hearing order.

(2) To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the pre-hearing order.

(3) The presiding officer may give nonparties an opportunity to present oral or written statements. If the presiding officer proposes to consider a statement by a nonparty, the presiding officer shall give all parties an opportunity to challenge or rebut it and, on motion of any party, the presiding officer shall require the statement to be given under oath or affirmation.

(4) The presiding officer may conduct all or part of the hearing by telephone, television, or other electronic means, if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

(5) The presiding officer shall cause the hearing to be recorded at the agency's expense. The agency is not required, at its expense, to prepare a transcript, unless required to do so by a provision of law. Any party, at the party's expense, may cause a reporter approved by the agency to prepare a transcript from the agency's record, or cause additional recordings to be made during the hearing if the making of the additional recordings does not cause distraction or disruption.

(6) The hearing is open to public observation, except for the parts that the presiding officer states to be closed pursuant to a provision of law expressly authorizing closure. To the extent that a hearing is conducted by telephone, television, or other electronic means, and is not closed, the availability of public observation is satisfied by giving members of the public an opportunity, at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency.

§ 4-212. [Evidence, Official Notice].

(a) Upon proper objection, the presiding officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. In the absence of proper objection, the presiding officer may exclude objectionable evidence. Evidence may not be excluded solely because it is hearsay.

- (b) All testimony of parties and witnesses must be made under oath or affirmation.
- (c) Statements presented by nonparties in accordance with Section 4-211(3) may be received as evidence.
- (d) Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party.
- (e) Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties must be given an opportunity to compare the copy with the original if available.
- (f) Official notice may be taken of (i) any fact that could be judicially noticed in the courts of this State, (ii) the record of other proceedings before the agency, (iii) technical or scientific matters within the agency's specialized knowledge, and (iv) codes or standards that have been adopted by an agency of the United States, of this State or of another state, or by a nationally recognized organization or association. Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material noticed, of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the facts or material so noticed.

§ 4-213. [Ex parte Communications].

- (a) Except as provided in subsection (b) or unless required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any party, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.
- (b) A member of a multi-member panel of presiding officers may communicate with other members of the panel regarding a matter pending before the panel, and any presiding officer may receive aid from staff assistants if the assistants do not (i) receive ex parte communications of a type that the presiding officer would be prohibited from receiving or (ii) furnish, augment, diminish, or modify the evidence in the record.
- (c) Unless required for the disposition of ex parte matters specifically authorized by statute, no party to an adjudicative proceeding, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may communicate, directly or indirectly, in connection with any issue in that proceeding, while the proceeding is pending, with any person serving as presiding officer, without notice and opportunity for all parties to participate in the communication.
- (d) If, before serving as presiding officer in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving,

the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (e).

(e) A presiding officer who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal within [10] days after notice of the communication.

(f) If necessary to eliminate the effect of an ex parte communication received in violation of this section, a presiding officer who receives the communication may be disqualified and the portions of the record pertaining to the communication may be sealed by protective order.

(g) The agency shall, and any party may, report any willful violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each agency by rule may provide for appropriate sanctions, including default, for any violations of this section.

§ 4-214. [Separation of Functions].

(a) A person who has served as investigator, prosecutor or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

(b) A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

(c) A person who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise a presiding officer in the same proceeding, unless a party demonstrates grounds for disqualification in accordance with Section 4-202.

(d) A person may serve as presiding officer at successive stages of the same adjudicative proceeding, unless a party demonstrates grounds for disqualification in accordance with Section 4-202.

§ 4-215. [Final Order, Initial Order].

(a) If the presiding officer is the agency head, the presiding officer shall render a final order.

(b) If the presiding officer is not the agency head, the presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with Section 4-216.

(c) A final order or initial order must include, separately stated, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, must be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. If a party has submitted proposed findings of fact, the order must include a ruling on the proposed findings. The order must also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order must include a statement of any circumstances under which the initial order, without further notice, may become a final order.

(d) Findings of fact must be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a civil trial. The presiding officer's experience, technical competence, and specialized knowledge may be utilized in evaluating evidence.

(e) If a person serving or designated to serve as presiding officer becomes unavailable, for any reason, before rendition of the final order or initial order, a substitute presiding officer must be appointed as provided in Section 4-202. The substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.

(f) The presiding officer may allow the parties a designated amount of time after conclusion of the hearing for the submission of proposed findings.

(g) A final order or initial order pursuant to this section must be rendered in writing within [90] days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless this period is waived or extended with the written consent of all parties or for good cause shown.

(h) The presiding officer shall cause copies of the final order or initial order to be delivered to each party and to the agency head.

§ 4-216. [Review of Initial Order; Exceptions to Reviewability].

(a) The agency head, upon its own motion may, and upon appeal by any party shall, review an initial order, except to the extent that:

- (1) a provision of law precludes or limits agency review of the initial order; or
- (2) the agency head, in the exercise of discretion conferred by a provision of law,
 - (i) determines to review some but not all issues, or not to exercise any review,
 - (ii) delegates its authority to review the initial order to one or more persons, or

(iii) authorizes one or more persons to review the initial order, subject to further review by the agency head.

(b) A petition for appeal from an initial order must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within [10] days after rendition of the initial order. If the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within [10] days after its rendition. The [10]-day period for a party to file a petition for appeal or for the agency head to give notice of its intention to review an initial order on the agency head's own motion is tolled by the submission of a timely petition for reconsideration of the initial order pursuant to Section 4-218, and a new [10]-day period starts to run upon disposition of the petition for reconsideration. If an initial order is subject both to a timely petition for reconsideration and to a petition for appeal or to review by the agency head on its own motion, the petition for reconsideration must be disposed of first, unless the agency head determines that action on the petition for reconsideration has been unreasonably delayed.

(c) The petition for appeal must state its basis. If the agency head on its own motion gives notice of its intent to review an initial order, the agency head shall identify the issues that it intends to review.

(d) The presiding officer for the review of an initial order shall exercise all the decision-making power that the presiding officer would have had to render a final order had the presiding officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the presiding officer upon notice to all parties.

(e) The presiding officer shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(f) Before rendering a final order, the presiding officer may cause a transcript to be prepared, at the agency's expense, of such portions of the proceeding under review as the presiding officer considers necessary.

(g) The presiding officer may render a final order disposing of the proceeding or may remand the matter for further proceedings with instructions to the person who rendered the initial order. Upon remanding a matter, the presiding officer may order such temporary relief as is authorized and appropriate.

(h) A final order or an order remanding the matter for further proceedings must be rendered in writing within [60] days after receipt of briefs and oral argument unless that period is waived or extended with the written consent of all parties or for good cause shown.

(i) A final order or an order remanding the matter for further proceedings under this section must identify any difference between this order and the initial order and must include, or incorporate by express reference to the initial order, all the matters required by Section 4-215(c).

(j) The presiding officer shall cause copies of the final order or order remanding the matter for further proceedings to be delivered to each party and to the agency head.

§ 4-217. [Stay].

A party may submit to the presiding officer a petition for stay of effectiveness of an initial or final order within [7] days after its rendition unless otherwise provided by statute or stated in the initial or final order. The presiding officer may take action on the petition for stay, either before or after the effective date of the initial or final order.

§ 4-218. [Reconsideration].

Unless otherwise provided by statute or rule:

(1) Any party, within [10] days after rendition of an initial or final order, may file a petition for reconsideration, stating the specific grounds upon which relief is requested. The filing of the petition is not a prerequisite for seeking administrative or judicial review.

(2) The petition must be disposed of by the same person or persons who rendered the initial or final order, if available.

(3) The presiding officer shall render a written order denying the petition, granting the petition and dissolving or modifying the initial or final order, or granting the petition and setting the matter for further proceedings. The petition may be granted, in whole or in part, only if the presiding officer states, in the written order, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the order. The petition is deemed to have been denied if the presiding officer does not dispose of it within [20] days after the filing of the petition.

§ 4-219. [Review by Superior Agency].

If, pursuant to statute, an agency may review the final order of another agency, the review is deemed to be a continuous proceeding as if before a single agency. The final order of the first agency is treated as an initial order and the second agency functions as though it were reviewing an initial order in accordance with Section 4-216.

§ 4-220. [Effectiveness of Orders].

(a) Unless a later date is stated in a final order or a stay is granted, a final order is effective [10] days after rendition, but:

(1) a party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the final order;

(2) a nonparty may not be required to comply with a final order unless the agency has made the final order available for public inspection and copying or the nonparty has actual knowledge of the final order.

(b) Unless a later date is stated in an initial order or a stay is granted, the time when an initial order becomes a final order in accordance with Section 4-215 is determined as follows:

- (1) when the initial order is rendered, if administrative review is unavailable;
- (2) when the agency head renders an order stating, after a petition for appeal has been filed, that review will not be exercised, if discretion is available to make a determination to this effect; or
- (3) [10] days after rendition of the initial order, if no party has filed a petition for appeal and the agency head has not given written notice of its intention to exercise review.

(c) Unless a later date is stated in an initial order or a stay is granted, an initial order that becomes a final order in accordance with subsection (b) and Section 4-215 is effective [10] days after becoming a final order, but:

- (1) a party may not be required to comply with the final order unless the party has been served with or has actual knowledge of the initial order or of an order stating that review will not be exercised; and
- (2) a nonparty may not be required to comply with the final order unless the agency has made the initial order available for public inspection and copying or the nonparty has actual knowledge of the initial order or of an order stating that review will not be exercised.

(d) This section does not preclude an agency from taking immediate action to protect the public interest in accordance with Section 4-501.

§ 4-221. [Agency Record].

(a) An agency shall maintain an official record of each adjudicative proceeding under this Chapter.

(b) The agency record consists only of:

- (1) notices of all proceedings;
- (2) any pre-hearing order;
- (3) any motions, pleadings, briefs, petitions, requests, and intermediate rulings;
- (4) evidence received or considered;
- (5) a statement of matters officially noticed;
- (6) proffers of proof and objections and rulings thereon;
- (7) proposed findings, requested orders, and exceptions;
- (8) the record prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding;
- (9) any final order, initial order, or order on reconsideration;
- (10) staff memoranda or data submitted to the presiding officer, unless prepared and submitted by personal assistants and not inconsistent with Section 4-213(b); and
- (11) matters placed on the record after an ex parte communication.

(c) Except to the extent that this Act or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this Chapter and for judicial review thereof.

ARTICLE IV. CHAPTER III. OFFICE OF ADMINISTRATIVE HEARINGS

§ 4-301. [Office of Administrative Hearings--Creation, Powers, Duties].

(a) There is created the office of administrative hearings within the [Department of _____], to be headed by a director appointed by the governor [and confirmed by the senate].

(b) The office shall employ administrative law judges as necessary to conduct proceedings required by this Act or other provision of law. [Only a person admitted to practice law in [this State] [a jurisdiction in the United States] may be employed as an administrative law judge.]

(c) If the office cannot furnish one of its administrative law judges in response to an agency request, the director shall designate in writing a full-time employee of an agency other than the requesting agency to serve as administrative law judge for the proceeding, but only with the consent of the employing agency. The designee must possess the same qualifications required of administrative law judges employed by the office.

(d) The director may furnish administrative law judges on a contract basis to any governmental entity to conduct any proceeding not subject to this Act.

(e) The office may adopt rules:

(1) to establish further qualifications for administrative law judges, procedures by which candidates will be considered for employment, and the manner in which public notice of vacancies in the staff of the office will be given;

(2) to establish procedures for agencies to request and for the director to assign administrative law judges; however, an agency may neither select nor reject any individual administrative law judge for any proceeding except in accordance with this Act;

(3) to establish procedures and adopt forms, consistent with this Act, the model rules of procedure, and other provisions of law, to govern administrative law judges;

(4) to establish standards and procedures for the evaluation, training, promotion, and discipline of administrative law judges; and

(5) to facilitate the performance of the responsibilities conferred upon the office by this Act.

(f) The director may:

(1) maintain a staff of reporters and other personnel; and

(2) implement the provisions of this section and rules adopted under its authority.

ARTICLE IV. CHAPTER IV. CONFERENCE ADJUDICATIVE HEARING

§ 4-401. [Conference Adjudicative Hearing--Applicability].

A conference adjudicative hearing may be used if its use in the circumstances does not violate any provision of law and the matter is entirely within one or more categories for which the agency by rule had adopted this chapter [; however, those categories may include only the following:

(1) a matter in which there is no disputed issue of material fact; or

(2) a matter in which there is a disputed issue of material fact, if the matter involves only:

(i) a monetary amount of not more than [\$1,000];

(ii) a disciplinary sanction against a prisoner;

(iii) a disciplinary sanction against a student which does not involve expulsion from an academic institution or suspension for more than [10] days;

(iv) a disciplinary sanction against a public employee which does not involve discharge from employment or suspension for more than [10] days;

(v) a disciplinary sanction against a licensee which does not involve revocation, suspension, annulment, withdrawal, or amendment of a license; or

(vi) . . .]

§ 4-402. [Conference Adjudicative Hearing--Procedures].

The procedures of this Act pertaining to formal adjudicative hearings apply to a conference adjudicative hearing, except to the following extent:

(1) If a matter is initiated as a conference adjudicative hearing, no pre-hearing conference may be held.

(2) The provisions of Section 4-210 do not apply to conference adjudicative hearings insofar as those provisions authorize the issuance and enforcement of subpoenas and discovery orders, but do apply to conference adjudicative hearings insofar as those provisions authorize the presiding officer to issue protective orders at the request of any party or upon the presiding officer's motion.

(3) Paragraphs (1), (2) and (3) of Section 4-211 do not apply; but,

(i) the presiding officer shall regulate the course of the proceedings,

(ii) only the parties may testify and present written exhibits, and

(iii) the parties may offer comments on the issues.

§ 4-403. [Conference Adjudicative Hearing--Proposed Proof].

(a) If the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require any party to state the identity of the witnesses or other sources through whom the party would propose to present proof if the proceeding were converted to a formal adjudicative hearing, but if disclosure of any fact, allegation, or source is privileged or expressly prohibited by any provision of law, the presiding officer may require the party to indicate that confidential facts, allegations, or sources are involved, but not to disclose the confidential facts, allegations, or sources.

(b) If a party has reason to believe that essential facts must be obtained in order to permit an adequate presentation of the case, the party may inform the presiding officer regarding the general nature of the facts and the sources from whom the party would propose to obtain those facts if the proceeding were converted to a formal adjudicative

hearing.

ARTICLE IV. CHAPTER V. EMERGENCY AND SUMMARY ADJUDICATIVE PROCEEDINGS

§ 4-501. [Emergency Adjudicative Proceedings].

(a) An agency may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.

(b) The agency may take only such action as is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.

(c) The agency shall render an order, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the determination of an immediate danger and the agency's decision to take the specific action.

(d) The agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when rendered.

(e) After issuing an order pursuant to this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

(f) The agency record consists of any documents regarding the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

(g) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency adjudicative proceedings or for judicial review thereof.

§ 4-502. [Summary Adjudicative Proceedings--Applicability].

An agency may use summary adjudicative proceedings if:

- (1) the use of those proceedings in the circumstances does not violate any provision of law;
- (2) the protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties; and
- (3) the matter is entirely within one or more categories for which the agency by rule has adopted this section and Sections 4-503 to 4-506 [; however, those categories may include only the following:
 - (i) a monetary amount of not more than [\$100];

- (ii) a reprimand, warning, disciplinary report, or other purely verbal sanction without continuing impact against a prisoner, student, public employee, or licensee;
- (iii) the denial of an application after the applicant has abandoned the application;
- (iv) the denial of an application for admission to an educational institution or for employment by an agency;
- (v) the denial, in whole or in part, of an application if the applicant has an opportunity for administrative review in accordance with Section 4-504;
- (vi) a matter that is resolved on the sole basis of inspections, examinations, or tests;
- (vii) the acquisition, leasing, or disposal of property or the procurement of goods or services by contract;
- (viii) any matter having only trivial potential impact upon the affected parties; and
- (ix)

§ 4-503. [Summary Adjudicative Proceedings--Procedures].

(a) The agency head, one or more members of the agency head, one or more administrative law judges assigned by the office of administrative hearings in accordance with Section 4-301 [, or, unless prohibited by law, one or more other persons designated by the agency head], in the discretion of the agency head, may be the presiding officer. Unless prohibited by law, a person exercising authority over the matter is the presiding officer.

(b) If the proceeding involves a monetary matter or a reprimand, warning, disciplinary report, or other sanction:

- (1) the presiding officer, before taking action, shall give each party an opportunity to be informed of the agency's view of the matter and to explain the party's view of the matter; and
- (2) the presiding officer, at the time any unfavorable action is taken, shall give each party a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the action, and a notice of any available administrative review.

(c) An order rendered in a proceeding that involves a monetary matter must be in writing. An order in any other summary adjudicative proceeding may be oral or written.

(d) The agency, by reasonable means, shall furnish to each party notification of the order in a summary adjudicative proceeding. Notification must include at least a statement of the agency's action and a notice of any available administrative review.

§ 4-504. [Administrative Review of Summary Adjudicative Proceedings--Applicability].

Unless prohibited by any provision of law, an agency, on its own motion, may conduct administrative review of an order resulting from summary adjudicative proceedings, and shall conduct this review upon the written or oral request of a party if the agency receives the request within [10] days after furnishing notification under Section 4-503(d).

§ 4-505. [Administrative Review of Summary Adjudicative Proceedings--Procedures].

Unless otherwise provided by statute [or rule]:

(1) An agency need not furnish notification of the pendency of administrative review to any person who did not request the review, but the agency may not take any action on review less favorable to any party than the original order without giving that party notice and an opportunity to explain that party's view of the matter.

(2) The reviewing officer, in the discretion of the agency head, may be any person who could have presided at the summary adjudicative proceeding, but the reviewing officer must be one who is authorized to grant appropriate relief upon review.

(3) The reviewing officer shall give each party an opportunity to explain the party's view of the matter unless the party's view is apparent from the written materials in the file submitted to the reviewing officer. The reviewing officer shall make any inquiries necessary to ascertain whether the proceeding must be converted to a conference adjudicative hearing or a formal adjudicative hearing.

(4) The reviewing officer may render an order disposing of the proceeding in any manner that was available to the presiding officer at the summary adjudicative proceeding or the reviewing officer may remand the matter for further proceedings, with or without conversion to a conference adjudicative hearing or a formal adjudicative hearing.

(5) If the order under review is or should have been in writing, the order on review must be in writing, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the order, and a notice of any further available administrative review.

(6) A request for administrative review is deemed to have been denied if the reviewing officer does not dispose of the matter or remand it for further proceedings within [20] days after the request is submitted.

§ 4-506. [Agency Record of Summary Adjudicative Proceedings and Administrative Review].

(a) The agency record consists of any documents regarding the matter that were considered or prepared by the presiding officer for the summary adjudicative proceeding or by the reviewing officer for any review. The agency shall maintain these documents as its official record.

(b) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in summary adjudicative proceedings or for judicial review thereof.

ARTICLE V. JUDICIAL REVIEW AND CIVIL ENFORCEMENT

ARTICLE V. CHAPTER I. JUDICIAL REVIEW

§ 5-101. [Relationship Between this Act and Other Law on Judicial Review and Other Judicial Remedies].

This Act establishes the exclusive means of judicial review of agency action, but:

(1) The provisions of this Act for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(2) Ancillary procedural matters, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this Act, by other applicable law.

(3) If the relief available under other sections of this Act is not equal or substantially equivalent to the relief otherwise available under law, the relief otherwise available and the related procedures supersede and supplement this Act to the extent necessary for their effectuation. The applicable provisions of this Act and other law must be combined to govern a single proceeding or, if the court orders, 2 or more separate proceedings, with or without transfer to other courts, but no type of relief may be sought in a combined proceeding after expiration of the time limit for doing so.

§ 5-102. [Final Agency Action Reviewable].

(a) A person who qualifies under this Act regarding (i) standing (Section 5-106), (ii) exhaustion of administrative remedies (Section 5-107), and (iii) time for filing the petition for review (Section 5-108), and other applicable provisions of law regarding bond, compliance, and other pre-conditions is entitled to judicial review of final agency action, whether or not the person has sought judicial review of any related non-final agency action.

(b) For purposes of this section and Section 5-103:

(1) "Final agency action" means the whole or a part of any agency action other than non-final agency action;

(2) "Non-final agency action" means the whole or a part of an agency determination, investigation, proceeding, hearing, conference, or other process that the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency.

§ 5-103. [Non-final Agency Action Reviewable].

A person is entitled to judicial review of non-final agency action only if:

(1) it appears likely that the person will qualify under Section 5-102 for judicial review of the related final agency action; and

(2) postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.

§ 5-104. [Jurisdiction, Venue]. [ALTERNATIVE A].

(a) The [trial court of general jurisdiction] shall conduct judicial review.

(b) Venue is in the [district] [that includes the state capital] [where the petitioner resides or maintains a principal place of business] unless otherwise provided by law.

§ 5-104. [Jurisdiction, Venue]. [ALTERNATIVE B].

(a) The [appellate court] shall conduct judicial review.

(b) Venue is in the [district] [that includes the state capital] [where the petitioner resides or maintains a principal place of business] unless otherwise provided by law.

(c) If evidence is to be adduced in the reviewing court in accordance with Section 5-114(a), the court shall appoint a [referee, master, trial court judge] for this purpose, having due regard for the convenience of the parties.

§ 5-105. [Form of Action].

Judicial review is initiated by filing a petition for review in [the appropriate] court. A petition may seek any type of relief available under Sections 5-101(3) and 5-117.

§ 5-106. [Standing].

(a) The following persons have standing to obtain judicial review of final or non-final agency action:

- (1) a person to whom the agency action is specifically directed;
- (2) a person who was a party to the agency proceedings that led to the agency action;
- (3) if the challenged agency action is a rule, a person subject to that rule;
- (4) a person eligible for standing under another provision of law; or
- (5) a person otherwise aggrieved or adversely affected by the agency action. For purposes of this paragraph, no person has standing as one otherwise aggrieved or adversely affected unless:
 - (i) the agency action has prejudiced or is likely to prejudice that person;
 - (ii) that person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
 - (iii) a judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

[(b) A standing committee of the legislature which is required to exercise general and continuing oversight over administrative agencies and procedures may petition for judicial review of any rule or intervene in any litigation arising from agency action.]

§ 5-107. [Exhaustion of Administrative Remedies].

A person may file a petition for judicial review under this Act only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review, but:

(1) a petitioner for judicial review of a rule need not have participated in the rule-making proceeding upon which that rule is based, or have petitioned for its amendment or repeal;

(2) a petitioner for judicial review need not exhaust administrative remedies to the extent that this Act or any other statute states that exhaustion is not required; or

(3) the court may relieve a petitioner of the requirement to exhaust any or all administrative remedies, to the extent that the administrative remedies are inadequate, or requiring their exhaustion would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

§ 5-108. [Time for Filing Petition for Review].

Subject to other requirements of this Act or of another statute:

(1) A petition for judicial review of a rule may be filed at any time, except as limited by Section 3-113(b).

(2) A petition for judicial review of an order is not timely unless filed within [30] days after rendition of the order, but the time is extended during the pendency of the petitioner's timely attempts to exhaust administrative remedies, if the attempts are not clearly frivolous or repetitious.

(3) A petition for judicial review of agency action other than a rule or order is not timely unless filed within [30] days after the agency action, but the time is extended:

(i) during the pendency of the petitioner's timely attempts to exhaust administrative remedies, if the attempts are not clearly frivolous or repetitious; and

(ii) during any period that the petitioner did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this Act.

§ 5-109. [Petition for Review--Filing and Contents].

(a) A petition for review must be filed with the clerk of the court.

(b) A petition for review must set forth:

(1) the name and mailing address of the petitioner;

(2) the name and mailing address of the agency whose action is at issue;

(3) identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action;

(4) identification of persons who were parties in any adjudicative proceedings that led to the agency action;

(5) facts to demonstrate that the petitioner is entitled to obtain judicial review;

- (6) the petitioner's reasons for believing that relief should be granted; and
- (7) a request for relief, specifying the type and extent of relief requested.

§ 5-110. [Petition for Review--Service and Notification].

(a) A petitioner for judicial review shall serve a copy of the petition upon the agency in the manner provided by [statute] [the rules of civil procedure].

(b) The petitioner shall use means provided by [statute] [the rules of civil procedure] to give notice of the petition for review to all other parties in any adjudicative proceedings that led to the agency action.

§ 5-111. [Stay and Other Temporary Remedies Pending Final Disposition].

(a) Unless precluded by law, the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.

(b) A party may file a motion in the reviewing court, during the pendency of judicial review, seeking interlocutory review of the agency's action on an application for stay or other temporary remedies.

(c) If the agency has found that its action on an application for stay or other temporary remedies is justified to protect against a substantial threat to the public health, safety, or welfare, the court may not grant relief unless it finds that:

- (1) the applicant is likely to prevail when the court finally disposes of the matter;
- (2) without relief the applicant will suffer irreparable injury;
- (3) the grant of relief to the applicant will not substantially harm other parties to the proceedings; and
- (4) the threat to the public health, safety, or welfare relied on by the agency is not sufficiently serious to justify the agency's action in the circumstances.

(d) If subsection (c) does not apply, the court shall grant relief if it finds, in its independent judgment, that the agency's action on the application for stay or other temporary remedies was unreasonable in the circumstances.

(e) If the court determines that relief should be granted from the agency's action on an application for stay or other temporary remedies, the court may remand the matter to the agency with directions to deny a stay, to grant a stay on appropriate terms, or to grant other temporary remedies, or the court may issue an order denying a stay, granting a stay on appropriate terms, or granting other temporary remedies.

§ 5-112. [Limitation on New Issues].

A person may obtain judicial review of an issue that was not raised before the agency, only to the extent that:

- (1) the agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue;

(2) the person did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, facts giving rise to the issue;

(3) the agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings which provided an adequate opportunity to raise the issue;

(4) the agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this Act; or

(5) the interests of justice would be served by judicial resolution of an issue arising from:

(i) a change in controlling law occurring after the agency action; or

(ii) agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

§ 5-113. [Judicial Review of Facts Confined to Record for Judicial Review and Additional Evidence Taken Pursuant to Act].

Judicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in this Act, supplemented by additional evidence taken pursuant to this Act.

§ 5-114. [New Evidence Taken by Court or Agency Before Final Disposition].

(a) The court [(if Alternative B of Section 5-104 is adopted), assisted by a referee, master, trial court judge as provided in Section 5-104(c),] may receive evidence, in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(1) improper constitution as a decision-making body, or improper motive or grounds for disqualification, of those taking the agency action;

(2) unlawfulness of procedure or of decision-making process; or

(3) any material fact that was not required by any provision of law to be determined exclusively on an agency record of a type reasonably suitable for judicial review.

(b) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

(1) the agency was required by this Act or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;

(2) the court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, until after the agency action, and (ii) the interests of justice would be served by remand to the agency;

(3) the agency improperly excluded or omitted evidence from the record; or

(4) a relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

§ 5-115. [Agency Record for Judicial Review--Contents, Preparation, Transmittal, Cost].

(a) Within [_____] days after service of the petition, or within further time allowed by the court or by other provision of law, the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action, consisting of any agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material described in this Act as the agency record for the type of agency action at issue, subject to the provisions of this section.

(b) If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties stipulate to omit in accordance with subsection (d).

(c) The agency shall charge the petitioner with the reasonable cost of preparing any necessary copies and transcripts for transmittal to the court. [A failure by the petitioner to pay any of this cost to the agency does not relieve the agency from the responsibility for timely preparation of the record and transmittal to the court.]

(d) By stipulation of all parties to the review proceedings, the record may be shortened, summarized, or organized.

(e) The court may tax the cost of preparing transcripts and copies for the record:

- (1) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record;
- (2) as provided by Section 5-117; or
- (3) in accordance with any other provision of law.

(f) Additions to the record pursuant to Section 5-114 must be made as ordered by the court.

(g) The court may require or permit subsequent corrections or additions to the record.

§ 5-116. [Scope of Review; Grounds for Invalidity].

(a) Except to the extent that this Act or another statute provides otherwise:

- (1) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity; and
- (2) The validity of agency action must be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken.

(b) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(c) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by any one or more of the following:

- (1) The agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied.
- (2) The agency has acted beyond the jurisdiction conferred by any provision of law.
- (3) The agency has not decided all issues requiring resolution.
- (4) The agency has erroneously interpreted or applied the law.
- (5) The agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure.
- (6) The persons taking the agency action were improperly constituted as a decision-making body, motivated by an improper purpose, or subject to disqualification.
- (7) The agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this Act.
- (8) The agency action is:
 - (i) outside the range of discretion delegated to the agency by any provision of law;
 - (ii) agency action, other than a rule, that is inconsistent with a rule of the agency; [or]
 - (iii) agency action, other than a rule, that is inconsistent with the agency's prior practice unless the agency justifies the inconsistency by stating facts and reasons to demonstrate a fair and rational basis for the inconsistency. [; or] [.]
 - (iv) [otherwise unreasonable, arbitrary or capricious.]

§ 5-117. [Type of Relief].

- (a) The court may award damages or compensation only to the extent expressly authorized by another provision of law.
- (b) The court may grant other appropriate relief, whether mandatory, injunctive, or declaratory; preliminary or final; temporary or permanent; equitable or legal. In granting relief, the court may order agency action required by law, order agency exercise of discretion required by law, set aside or modify agency action, enjoin or stay the effectiveness of agency action, remand the matter for further proceedings, render a declaratory judgment, or take any other action that is authorized and appropriate.
- (c) The court may also grant necessary ancillary relief to redress the effects of official action wrongfully taken or withheld, but the court may award attorney's fees or witness fees only to the extent expressly authorized by other law.
- (d) If the court sets aside or modifies agency action or remands the matter to the agency for further proceedings, the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public pending further proceedings or agency action.

[§ 5-118. [Review by Higher Court].

Decisions on petitions for review of agency action are reviewable by the [appellate court] as in other civil cases.]

ARTICLE V. CHAPTER II. CIVIL ENFORCEMENT

§ 5-201. [Petition by Agency for Civil Enforcement of Rule or Order].

(a) In addition to other remedies provided by law, an agency may seek enforcement of its rule or order by filing a petition for civil enforcement in the [trial court of general jurisdiction.]

(b) The petition must name, as defendants, each alleged violator against whom the agency seeks to obtain civil enforcement.

(c) Venue is determined as in other civil cases.

(d) A petition for civil enforcement filed by an agency may request, and the court may grant, declaratory relief, temporary or permanent injunctive relief, any other civil remedy provided by law, or any combination of the foregoing.

§ 5-202. [Petition by Qualified Person for Civil Enforcement of Agency's Order].

(a) Any person who would qualify under this Act as having standing to obtain judicial review of an agency's failure to enforce its order may file a petition for civil enforcement of that order, but the action may not be commenced:

(1) until at least [60] days after the petitioner has given notice of the alleged violation and of the petitioner's intent to seek civil enforcement to the head of the agency concerned, to the attorney general, and to each alleged violator against whom the petitioner seeks civil enforcement;

(2) if the agency has filed and is diligently prosecuting a petition for civil enforcement of the same order against the same defendant; or

(3) if a petition for review of the same order has been filed and is pending in court.

(b) The petition must name, as defendants, the agency whose order is sought to be enforced and each alleged violator against whom the petitioner seeks civil enforcement.

(c) The agency whose order is sought to be enforced may move to dismiss on the grounds that the petition fails to qualify under this section or that enforcement would be contrary to the policy of the agency. The court shall grant the motion to dismiss unless the petitioner demonstrates that (i) the petition qualifies under this section and (ii) the agency's failure to enforce its order is based on an exercise of discretion that is improper on one or more of the grounds provided in Section 5-116(c)(8).

(d) Except to the extent expressly authorized by law, a petition for civil enforcement filed under this section may not request, and the court may not grant any monetary payment apart from taxable costs.

§ 5-203. [Defenses; Limitation on New Issues and New Evidence].

A defendant may assert, in a proceeding for civil enforcement:

- (1) that the rule or order sought to be enforced is invalid on any of the grounds stated in Section 5-116. If that defense is raised, the court may consider issues and receive evidence only within the limitations provided by Sections 5-112, 5-113, and 5-114; and
- (2) any of the following defenses on which the court, to the extent necessary for the determination of the matter, may consider new issues or take new evidence:
 - (i) the rule or order does not apply to the party;
 - (ii) the party has not violated the rule or order;
 - (iii) the party has violated the rule or order but has subsequently complied, but a party who establishes this defense is not necessarily relieved from any sanction provided by law for past violations; or
 - (iv) any other defense allowed by law.

§ 5-204. [Incorporation of Certain Provisions on Judicial Review].

Proceedings for civil enforcement are governed by the following provisions of this Act on judicial review, as modified where necessary to adapt them to those proceedings:

- (1) Section 5-101(2) (ancillary procedural matters); and
- (2) Section 5-115 (agency record for judicial review--contents, preparation, transmittal, cost.)

§ 5-205. [Review by Higher Court].

Decisions on petitions for civil enforcement are reviewable by the [appellate court] as in other civil cases.