

## Should Pennsylvania Update the Administrative Agency Law By Adopting the Adjudicative Provisions of the Model State Administrative Procedures Act?

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### Summary

The core provisions of the Pennsylvania Administrative Agency Law<sup>2</sup> have remained substantially unchanged since 1968, and the General Rules of Administrative Practice and Procedure (“General Administrative Rules”)<sup>3</sup> have not been materially modified since 1982. In 2010, the Uniform Law Commission adopted a revised version of the Model State Administrative Procedures Act (“MSAPA.”). Consideration is currently being given by Senators Richard L. Alloway II and Stewart J. Greenleaf to the introduction of a comprehensive set of amendments to the Administrative Agency Law based upon the provisions of the MSAPA relating to agency adjudications and recodifying existing law relating to the regulatory process. If enacted, these amendments will result in a number of significant improvements to the manner in which agencies conduct adjudications, including measures that will:

- More effectively ensure the impartiality and independence of hearing officers and agency heads reviewing the recommendations of hearing officers;
- Promote the use of electronic communications in conducting adjudications;
- Strictly limit and regulate *ex parte* communications with agency decision makers;
- Expand the rights of parties to engage in discovery, while preserving the ability of agencies to take measures to ensure that discovery is not excessively burdensome or time consuming;
- Codify the *legal residuum* rule;
- Enhance access to records of agency decisions and impose reasonable restrictions on the ability of agencies to rely on prior decisions as precedent;
- Allow in appropriate circumstances for the agency record to be modified, expanded or enlarged upon appeal; and

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<sup>2</sup> 2 Pa.C.S. Chapter 5, Subchapter A and Chapter 17, Subchapter A.

<sup>3</sup> 1 Pa. Code Part II.

- Clarify several important issues relating to access to judicial review.

Updating the Administrative Agency Law on the other hand will also pose a number of difficult issues that should be carefully considered before proceeding, including determining:

- The circumstances in which agency procedures should be fully or partially exempt from the amended Administrative Agency Law;
- How to provide for updating of the General Administrative Rules to comply with amendments to the Administrative Agency Law;
- Whether agency heads should continue to have the have the power to review and modify the decisions of hearing officers;
- How to properly define the circumstances in which persons adversely affected by agency actions have a right to an administrative hearing;
- When parties have standing to participate in agency adjudications and appeals; and
- The scope of judicial review when extra-record evidence is considered.

These challenges, however, should not dissuade members of the bar and the General Assembly from a careful review and evaluation of the Administrative Agency Law and the General Administrative Rules to better ensure the fairness, impartiality and efficiency of agency adjudications.

## **Role of the Uniform Law Commission**

The ULC, also known as the National Conference of Commissioners on Uniform State Laws, is an independent non-governmental organization comprised of representatives from every state, as well as the District of Columbia, the Virgin Islands and Puerto Rico. Voting power is exercised on a basis of “one state, one vote.” The purpose of the ULC is to promote uniformity in state law on all subjects where uniformity is desirable and practical. To accomplish this, the Conference drafts Acts on various subjects and endeavor to secure enactment of proposed Acts in every State.

Organized in 1892, the Conference has drafted and often redrafted hundreds of Acts in response to changing social and commercial circumstances. Many of those Acts, such as the Uniform Commercial Code, have been universally enacted, or nearly so. A substantial number of laws promulgated by the ULC have been enacted in Pennsylvania, including most prominently the Uniform Commercial Code. Other acts promulgated by the ULC and adopted by Pennsylvania in recent years include the Uniform Athletic Agents Act, the Uniform Child Custody Jurisdiction and Enforcement Act, the Condominium Code, the Uniform Conservation Easements Act, the Uniform Determination of Death Act, the Uniform Electronic Transactions Act, the Uniform Environmental Covenants Act, the Fraudulent Transfers Act, the TOD Securities Registration Act, the Uniform Trade Secrets Act, and the Trust Code.

Commissioners are appointed pursuant to the particular appointment process of each State. The governors and other appointing authorities have appointed lawyers from every field

of legal practice, as well as judges, legislators and law professors. All Commissioners are members of the Bar, and serve without compensation. A small administrative staff assists the Commissioners from its Chicago headquarters.

The members of the Pennsylvania Delegation to the ULC are appointed by the Governor, the President Pro Tempore of the Senate, the Speaker of the House and the Senate and House Minority Leaders. The Attorney General and the Governor's General Counsel, or their designees, and representatives of the Legislative Reference Bureau and the Joint State Government Commission, are also members of the Pennsylvania Delegation.<sup>4</sup>

## **History of the MSAPA**

While generally the ULC promulgates acts designated as "uniform," the Commission sometimes also promulgates "model" acts. Acts are designated as "uniform" if (A) there is a substantial reason to anticipate enactment in a large number of jurisdictions; and (B) uniformity of the provisions of the proposed enacted amount the various jurisdictions is a principal objective. Acts are designated as "model" if (A) uniformity may be a desirable objective, but not a principal objective; (B) the act may promote uniformity and minimize diversity, even though a significant number of jurisdictions may not adopt the act in its entirety; or (C) the purposes of the act can be substantially achieved, even though it is not adopted in its entirety by every State.<sup>5</sup>

The MSAPA was first promulgated by the ULC in 1946 at about the same time as the Federal Administrative Procedure Act and was the result of a substantial amount of collaboration communication between the drafters of the two acts. Prior to 2010, the MSAPA was previously revised in 1961 and 1981.<sup>6</sup> The development of the 2010 revisions began in 2004 and the text of Act was reviewed at six annual meetings of the ULC and at more than ten Drafting Committee Meetings. John L. Gedid of Widener Law School Harrisburg Campus served the Reporter for the Drafting Committee, together with Gregory Ogden of the Pepperdine University School of

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<sup>4</sup> In addition to the author of this Report, other members of the Pennsylvania Delegation are:

CHRISTOPHER D. CARUSONE, Executive Deputy General Counsel, Governor's Office of General Counsel.

WILLIAM H. CLARK, JR., Drinker Biddle & Reath LLP, Philadelphia, PA (Representing the Joint State Government Commission)

MARY JO HOWARD DIVELY, Carnegie Mellon University, Pittsburgh, PA (Appointed by the House Majority Leader)

VINCENT C. DELIBERATO, JR., Legislative Reference Bureau, Room 641 Main Capitol, Harrisburg, PA 17120-0033

ROBERT MULLE, Chief Deputy Attorney General for Legal Review, Harrisburg, PA

CURTIS R. REITZ, University of Pennsylvania, School of Law, Philadelphia, PA (Appointed by the Governor)

NORA WINKELMAN, Chief Counsel, PA House Democratic Caucus, Harrisburg PA (Appointed by the Governor)

MICHAEL SCHWOYER, Special Counsel to the House Minority Leader, Harrisburg, PA 17120 (Appointed by the House Minority Leader)

<sup>5</sup> July 13, 2001, ULC Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts, § 1(f).

<sup>6</sup> The text of the 1961 MSAPA is available at <http://www.japc.state.fl.us/publications/USAPA/MSAPA.1961.pdf> ; the text of 1981 MSAPA is available at [http://www.nccusl.org/Act.aspx?title=Model State Administrative Procedure Act \(1981\)](http://www.nccusl.org/Act.aspx?title=Model State Administrative Procedure Act (1981)); and the text of the 2010 MSAPA is available at <http://www.nccusl.org/Act.aspx?title=State Administrative Procedure Act, Revised Model>.

Law.<sup>7</sup>

The 2010 revisions were intended to incorporate the best practices based on the many changes that have occurred in administrative law over the past 28 years, both at the state and federal levels. While the 2010 version of the Act maintains continuity with the provisions of the 1961 Act, and to a lesser degree, the 1981 Act, the revised Act is intended to be less detailed and less prescriptive than the 1981 Act. As a result, it is worthwhile to consult the provisions of the 1981 Act to the extent certain provisions of the 2010 Act require supplementation.

The Revised 2010 MSAPA is divided into seven substantive articles. In summary:

- Article 1 contains extensive definitions of key terms used throughout the act which are supplemented in individual articles by terms used only in those articles.
- Article 2 contains provisions ensuring public access to agency law and policy. It modernizes and codifies publishing responsibilities for agencies that have primary responsibility for rules publishing and for agencies that adopt rules.
- Article 3 contains provisions governing rulemaking by agencies, including new provisions relating to negotiated rulemaking, regulatory analysis, direct final rulemaking, and guidance documents.
- Article 4: contains provisions governing adjudication by agencies. Article 4 procedures are designed to be used by both central panel agencies (governed by Article Six) and enforcement agencies that conduct their own contested case hearings.
- Article 5: contains provisions governing judicial review of final agency action, including the right to judicial review and finality of agency, relation to other judicial review law, time for seeking judicial review, stays pending appeal, standing, exhaustion of administrative remedies, and the scope of review.
- Article 6: is based on the ABA Model Central Panel Act, and provides for the essential provisions of law that a state legislature would need to create a central panel agency.
- Article 7: contains provisions related to legislative review of agency rules, including legislative rules review

The draft Pennsylvania legislation is based upon Article 4 and 5 and incorporates key definitions from Article 1.

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<sup>7</sup> Members of the Drafting Committee responsible for development of the 2010 Act were:

FRANCIS J. PAVETTI, Waterford, CT., Chair

JERRY L. BASSETT, Legislative Reference Service, Montgomery, AL.

STEPHEN C. CAWOOD, Pineville, KY.

KENNETH D. DEAN, University of Missouri-Columbia School of Law, Columbia, MO.

BRIAN K. FLOWERS, Council of the District of Columbia, Washington, DC.

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ROBERT J. TENNESSEN, Minneapolis, MN.

## **History of the Administrative Agency Law and the General Administrative Rules**

Pennsylvania's Administrative Agency Law was originally enacted on June 4, 1945, and pre-dated by approximately one year the adoption of the Federal Administrative Procedures Act and the 1946 version of the MSAPA.<sup>8</sup> As a result, the law was enacted without the full benefit of the extensive work of the Administrative Conference of the United States and the ULC which contributed to the enactment of the Federal Act and the first version of the MSAPA.

Amendments were adopted to the adjudicative provisions of the Administrative Agency Law to implement the 1968 amendments to the Constitution of Pennsylvania.<sup>9</sup> These amendments repealed provisions of the 1946 law which barred the judicial review of agency actions designated as "final" by another law, and substituted provisions declaring that the adjudications of all agencies are subject to review, "regardless of the fact that a statute expressly provides that there shall be no appeal from an adjudication of an agency." Otherwise, with the exception of the shift of responsibility for appeals of agency actions from the Court of Common Pleas of Dauphin County to the Commonwealth Court,<sup>10</sup> the recodification of the law into the Consolidated Pennsylvania Statutes;<sup>11</sup> and the recent addition of new chapters dealing with the use of interpreters,<sup>12</sup> the core provisions of the law relating to adjudications and judicial review have remain largely frozen in time and have not benefitted from the evolution in administrative law that has occurred over the last 66 years.

Notwithstanding the failure of the Commonwealth to update and revise the basic adjudicative provisions of the Administrative Agency Law itself since 1946, the adoption of the General Administrative Rules in 1968 supplemented the bare-bones provisions of the law. The General Administrative Rules were adopted pursuant to provisions of the Commonwealth Documents Law which authorized the Legislative Reference Bureau, acting under the supervision of the Joint Documents Committee, to "revise the text of ... administrative regulations ... to the format established for the [Pennsylvania Code]." The General Administrative Rules, however, did not represent a revision to the format of any specific prior regulations, but instead constituted a new set of procedural rules developed by the Joint Documents Committee to implement Article V, section 9 of the Pennsylvania Constitution, as ratified in 1968, to provide a constitutional right of appeal from an administrative agency to a court or record or an appellate court.<sup>13</sup>

Based upon provisions of the Administrative Agency Law granting individual agencies, rather than the Joint Documents Committee, the power to adopt implementing regulations,<sup>14</sup> the General Administrative Rules represent only a default set of procedures applicable to all

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<sup>8</sup> The Act of June 4, 1945 (P.L. 1388, No. 442), effective January 1, 1946.

<sup>9</sup> The Act of December 2, 1968 (P.L. 1135, No. 354).

<sup>10</sup> The Act of July 31, 1970 (P.L. 673, No. 223).

<sup>11</sup> The Act of April 28, 1978 (P.L. 202, No. 53).

<sup>12</sup> The Act of November 29, 2006 (P.L. 1538, No. 172).

<sup>13</sup> See 1 Pa.B. 490-491 (Nov. 14, 1970) and 1 Pa.B. 1179 (April 20, 1971).

<sup>14</sup> 2 Pa.C.S. § 102(a).

agencies unless the provisions of another statute or rules of procedure adopted by individual agencies contain inconsistent provisions.<sup>15</sup> As a result, most agencies have adopted their own procedural rules which supplement, or in some cases totally supplant, the General Administrative Rules.

While the adoption of the General Administrative Rules was very helpful in supplementing the provisions of the Administrative Agency Law, due to the repeal of the provisions of the Commonwealth Documents Law under which the General Administrative Rules were originally adopted,<sup>16</sup> and questions about whether the Joint Documents Committee had overstepped its authority, the General Administrative Rules have also now remain largely unchanged since 1968. As a result, for more than 50 years there has been no central source of authority regarding Pennsylvania administrative law relating to adjudicative procedure and each Commonwealth agency has been left to fend for itself in developing rules of procedure which modify or supersede the General Administrative Rules.

### **Benefits of Updating the Administrative Agency Law Based Upon the MSAPA**

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

The amendments address all aspects of the adjudicative process and provide greater guidance regarding a wide range of matters addressed by the General Administrative Rules and individual current agency rules in a manner consistent with what are widely perceived to represent best agency practices. Some of the more important changes to current law, however, occur in the following areas:

#### **A. Qualifications of Hearing Officers**

Currently, the qualifications of hearing officers are not addressed by the Administrative Agency Law and the relevant provisions of the General Administrative Rules merely provide that a presiding officer may withdraw from a proceeding when he deems himself disqualified, or he may be withdrawn by the agency head for good cause because of “personal bias or other disqualification” as determined by agency head or another presiding designated by the agency

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<sup>15</sup> 1 Pa. Code § 31.1.

<sup>16</sup> Act 1968-240, 45 P.S. § 1403 (repealed by Act 1976-160).

head delegated to investigate allegations of bias and disqualification raised by parties to a proceeding in an affidavit.<sup>17</sup>

The proposed amendments to the Administrative Agency Law provide that an individual may not serve as a presiding officer if the individual at any stage in consideration of a matter the subject of an adjudication “served as an investigator, prosecutor, or advocate,” or is “subject to the authority, direction or discretion” of such an individual.<sup>18</sup> The participation by the agency head in probable cause determinations or “other preliminary matters,” however, does not disqualify an agency head from reviewing decisions of presiding officers absent other grounds for disqualification.<sup>19</sup> The amendments further provide that both a hearing officer or an agency head may be disqualified from participation in an adjudication based upon bias, prejudice, financial interest, participation in prohibited *ex parte* contacts, or “any other factor which would cause a reasonable person to question the impartiality” of the presiding officer or agency head.<sup>20</sup>

To ensure that issues relating to potential disqualification are raised in a timely manner, the amendments impose a duty upon hearing officers and agency heads to affirmatively disclose “any known facts related to grounds for disqualification which are material to the impartiality of the presiding officer or agency head.”<sup>21</sup>

The proposed amendments also contain a number of measures to ensure the prompt, fair and definitive review of issues pertaining to the qualifications of hearing officers and agency heads. Challenges to the qualifications of hearing officers or agency heads must “state with particularity the ground on which it is claimed that a fair and impartial hearing cannot be accorded or the applicable rule or canon of ethics that requires disqualification.”<sup>22</sup> Petitions for disqualification must be filed “upon discovering facts establishing a ground for disqualification,” and the failure of a party to “exercise due diligence in requesting disqualification” allows a petition for disqualification to be denied.<sup>23</sup> Decisions regarding petitions for disqualification must be made by the hearing officer or agency head whose disqualification is requested and must “state in the record facts and reasons for the decision” and are not subject to interlocutory judicial review.<sup>24</sup>

## **B. Electronic Adjudications**

While many agencies currently conduct adjudications in whole or in part telephonically or using other methods of electronic communication, the use of electronic technology in

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<sup>17</sup> 1 Pa. Code § 35.186.

<sup>18</sup> Proposed Revised Administrative Agency Law (“RAAL”) § 502(b)(1).

<sup>19</sup> RAAL § 502(b)(2).

<sup>20</sup> RAAL § 502(c)(1).

<sup>21</sup> RAAL § 502(c)(2).

<sup>22</sup> RAAL § 502(d)(2).

<sup>23</sup> RAAL § 502(d)(1) & (3).

<sup>24</sup> RAAL § 502(d).

adjudications is not currently addressed by either the Administrative Agency Law or the General Administrative Rules. The proposed amendments to the Administrative Agency Law allow a presiding officer to “conduct all or part of an evidentiary hearing or prehearing conference by telephone, television, video conference, or electronic means,” but testimony may not be taken from witnesses who cannot be seen only with the consent of all parties and if the presiding officer makes a determination that such procedures will “not impair reliable determination of the credibility of testimony.”<sup>25</sup>

Unless grounds exist for conducting a closed door hearing, where electronic communications are used members of the public must be afforded an opportunity to attend a hearing at the location where the presiding officer is present to hear the proceedings as they occur.<sup>26</sup>

### C. *Ex Parte* Communications

The Administrative Agency Law currently imposes no restrictions on *ex parte* communications and the General Administrative Rules merely provides that except as otherwise provided by law or agency rules, a hearing officer may not “consult a person or party on a fact in issue unless upon notice and opportunity for participants to participate.”<sup>27</sup> Except where an agency head acts as a presiding officer to take testimony in an adjudication, the General Administrative Rules impose no restrictions upon agency heads reviewing decisions of hearing officers from engaging in *ex parte* communications.

The proposed amendments to the Administrative Agency Law contain a variety of provisions to more effectively deal with *ex parte* communications. Except as authorized by statute or a variety of specific enumerated exceptions, neither the presiding officer or the final agency decision maker may communicate with any person regarding a case without notice and an opportunity for all parties to participate in the communications.<sup>28</sup> For purposes of applying these restrictions, an adjudication is treated as pending from the “issuance of the agency’s pleading,” such as the filing of a rule to show cause, or “the application for an agency decision,” such as the submission of a permit application, whichever is earlier.<sup>29</sup> Exceptions to the restrictions, however, are provided for:

- Consultations among members of a multi-member body acting as a presiding officer or final decision maker;
- Communications regarding uncontested procedural matters;
- Communications with legal advisors authorized by law to provide advice to presiding officers or agency heads;

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<sup>25</sup> RAAL § 502(e).

<sup>26</sup> RAAL § 502(f).

<sup>27</sup> 1 Pa. Code § 35.188.

<sup>28</sup> RAAL § 508(b)(1) & (2).

<sup>29</sup> RAAL § 508(a).

- Administrative staff engaged in ministerial matters; and
- Communications by an agency head with staff about technical or scientific terms, or the technical or scientific basis of evidence, or about agency precedent, policies or procedures.

These exceptions do not apply, however, to individuals who have served as investigators, prosecutors or advocates at any stage of a case; individuals who have communicated regarding a case with persons the presiding officer or agency head may not consult with on an *ex parte* basis; and may not address the quality, sufficiency or weight of evidence, or the credibility of witnesses.<sup>30</sup>

In the event a presiding officer or final decision maker makes or receives a prohibited *ex parte* communication, the amendments require the presiding officer or decision maker to make a record of the communication part of the hearing record; prepare a memorandum to be included in the record regarding the identity of the parties to any such communication and the response of the hearing officer; and the substance of any verbal communications.<sup>31</sup> In addition, all parties must be given notice of any prohibited communications; an opportunity to respond to the communications; and for good cause, be provided an opportunity to present additional evidence in response to a prohibited communication.<sup>32</sup> The amendments allow remedial action to be taken in response to prohibited communications consisting of the disqualification or a presiding officer or final decision maker; the sealing of portions of the record containing *ex parte* communications; or other appropriate relief including an adverse ruling on the merits of case or dismissal of a pending matter.<sup>33</sup>

#### **D. Discovery**

The Administrative Agency Law does not address the question of whether and to what extent discovery is available in agency proceedings. The General Administrative Rules allow subpoenas to be issued for the attendance of witnesses and the production of documents upon application in writing to the presiding officer or orally during the course of a hearing, but grant presiding officers the discretion regarding the issuance of subpoenas based upon “the general relevance, materiality, and scope of the testimony or documentary evidence sought.”<sup>34</sup> Likewise, the General Administrative Rules allow depositions of witnesses to be taken upon application to the presiding officer “regarding a matter which is relevant to the issues involved in the pending proceeding, including the existence, description, nature, custody, condition and location of a book, document or other tangible thing, and the identity and location of persons having knowledge of relevant facts.” As with respect to requests for subpoenas, the presiding officer

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<sup>30</sup> RAAL § 508(b)(3), (c), (d) & (e).

<sup>31</sup> RAAL § 508(f).

<sup>32</sup> RAAL § 508(g).

<sup>33</sup> RAAL § 508(h).

<sup>34</sup> 35 Pa. Code § 35.142.

may grant or deny an application for the taking of a deposition based upon a determination regarding whether the taking of depositions is deemed to be warranted.<sup>35</sup>

There is virtually no precedent interpreting the scope of discretion granted to hearing officers in issuing or refusing the issuance of subpoenas or the taking of depositions. In *Weinberg v. Insurance Department*, 398 A.2d 1120 (Pa. Cmwlth. 1979), however, the Court held that discovery as provided by the Rules of Civil Procedure is not available in administrative proceedings, but remanded proceedings back to the Insurance Department for further proceedings regarding the cancellation of an insurance policy when the presiding officer failed to respond to requests for the issuance of subpoenas and failed to make any reference to the request in the record of the proceedings.

Because the General Administrative Rules may be superseded in whole or in part by inconsistent rules adopted by agencies, individual agency rules sometimes grant broader or narrower access to discovery. For example, the rules of procedure for proceedings before workers compensation judges provide extensive procedures for the exchange of information and discovery and require judges to issue subpoenas to compel the attendance of witnesses and for the production of books, records or documents upon the request of a party.<sup>36</sup> Likewise, the Department of Public Welfare's rules of procedure for medical assistance provider appeals appear to contain extensive provisions for the exchange of information and the conduct of discovery.<sup>37</sup> The Department of Public Welfare's rules of procedure for Medicaid provider appeals, however, do not apply to a broad array of "expedited" provider appeals. For example, discovery is unavailable in proceedings regarding the denial of claims for payment through the prior authorization process, the denial of requests for precertification, the recovery of overpayments or improper payments through the utilization review process, the denial of claims upon prepayment review, the denial of claims for payment based upon improper invoicing, the denial of claims for durable medical equipment grants, and the denial of requests for program exceptions.<sup>38</sup>

The proposed amendments to the Administrative Agency Law make no substantial changes to provisions of the General Administrative Rules relating to the issuance of subpoenas, but require that parties upon request must comply with discovery requests. Discovery is available regarding materials in the possession, custody or control of opposing parties, including any evidence an opposing party proposes to offer, statements of parties and witnesses, records, investigative reports, "exculpatory material in the possession of an agency," and other materials for good cause.<sup>39</sup> Presiding officers may, however, issue protective orders regarding the discovery of materials that are privileged, confidential or protected from disclosure, and for the disclosure of material that will "result in annoyance, embarrassment, oppression, undue burden or expense."<sup>40</sup> Exceptions to some or all discovery procedures, however, may be adopted by

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<sup>35</sup> 35 Pa. Code §§ 35.141 – 35.147.

<sup>36</sup> 34 Pa. Code §§ 131.61 – 131.81.

<sup>37</sup> 55 Pa. Code §§ 41.111 – 41.123.

<sup>38</sup> 55 Pa. Code § 41.92.

<sup>39</sup> RAAL §§ 510 & 511(b).

<sup>40</sup> RAAL § 511(c).

agencies by regulation if “discovery would unduly complicate or interfere with the hearing process because of the volume of the applicable caseload and the need for expedition and informality,” provided that “alternative procedures for the sharing of information are sufficient to ensure the fundamental fairness of the proceedings.”<sup>41</sup>

#### **E. Legal Residuum Rule**

The Administrative Agency Law provides that agencies are not bound by technical rules of evidence and provides that “all relevant evidence of reasonable probative value may be received.”<sup>42</sup> These provisions, however, have long been interpreted to not allow findings of fact to be based solely upon the provisions of properly objected to hearsay evidence unless confirmed or supported by otherwise admissible non-hearsay evidence.<sup>43</sup> Because of either unfamiliarity with the rule, or judicial reluctance to apply the rule, its application and enforcement upon appeal is subject to a substantial amount of inconsistency.

The proposed amendments codify the legal residuum rule by providing that “hearsay evidence may be used to supplement or explain other evidence, but, on timely objection, is not sufficient by itself to support a finding of fact unless it would be admissible over objection in a civil action.”<sup>44</sup>

#### **F. Treatment of Agency Decisions as Precedent**

Neither the Administrative Agency Law nor the General Administrative Rules address the question of whether and to what extent agency adjudications establish precedents regarding the interpretation of laws or regulations that may be followed by agencies or the public in subsequent proceedings and which preclude agencies from applying different interpretations of the same laws or policies in future adjudications involving the same issues, but different parties. Common law precedent, however, allows agencies to adopt statements of policy or interpretative regulations by adjudication and to apply these policies in subsequent proceedings.<sup>45</sup> Furthermore, once such policies are established, fundamental due process prohibits the policies from being applied unequally or in a manner that results in the disparate treatment of similarly situated persons without a reasonable basis, and prohibits changes in policies from being applied to persons to their detriment without reasonable notice.

The proposed changes to the Administrative Agency Law codify these principles by providing that, subject to redaction to protect confidential information, all final agency orders are subject to public review and copying and must be indexed by agencies in a manner that will

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<sup>41</sup> RAAL § 511(e).

<sup>42</sup> 2 Pa.C.S. § 505.

<sup>43</sup> See “Hearsay Evidence in Administrative Proceedings – Pros and Con Views on the Legal Residuum Rule,” Daniel R. Schuckers and John L Gedid, PA Bar Quarterly, Vol. LXXV, No. 1 (January 2004).

<sup>44</sup> RAAL § 513(e).

<sup>45</sup> See e.g., *Borough of Pottstown v. Pa. Municipal Retirement Bd.*, 551 Pa. 605, 610-611, 712 A.2d 741 (1998) (Upholding the application of an agency policy established by agency adjudication interpreting the provisions of a statute in subsequent adjudications and allowing a court to afford such policy “substantial deference,” but not to treat the policy as a binding legislative rule).

facilitate their retrieval and use. Furthermore, unless agencies properly index and designate final orders as precedential, agencies may not rely on final orders adverse to parties other than the agencies.<sup>46</sup>

The MSAPA also contains analogous provisions, not currently incorporated into draft amendments to the Administrative Agency Law, addressing the status of guidance documents in subsequent adjudications.<sup>47</sup> The MSAPA provides that a guidance document may be considered by a presiding officer or final decision maker in an agency adjudication, but “does not bind the presiding officer or the final decision maker in the exercise of discretion.” If an agency proposes to rely on a guidance document to the detriment of a person in an administrative proceeding, the agency is required to provide “an adequate opportunity to contest the legality or wisdom of a position taken in the document.” Conversely, if an agency proposes to act in an adjudication at variance with a position expressed in a guidance document, the agency must “provide a reasonable explanation for the variance” and if a person has reasonably relied on the agency’s position as set forth in a guidance document, the agency’s explanation must include “a reasonable justification for the agency’s conclusion that the need for the variance outweighs the affected person’s reliance interest.” Under no circumstances, however, may an agency rely on a guidance document “to foreclose consideration of issues raised in the document.” The MSAPA also allows petitions to be filed to revise or repeal guidance documents. Consideration should be given to adding these provisions to the draft amendments to the Administrative Agency Law.

#### **G. Modifications to the Record**

The administrative Agency Law provides without exception that courts shall hear appeals on the record certified by Commonwealth agencies.<sup>48</sup> This rule is problematic with respect to proceedings in which agencies fail to keep a record during adversarial proceedings, and certify a record after the fact to support an agency action. Defining the scope and content of the agency record poses particularly difficult issues in proceedings challenging the validity of informal agency rulemaking..

The proposed amendments provide important exceptions to the exclusivity of the agency record. To the extent an agency does not create a record during proceedings, the agency record is required to consist of “the unprivileged materials that agency decision makers directly or indirectly considered, or which were submitted for consideration by any person in connection with the action under review, including information that is adverse to the agency’s position.” In proceedings involving ministerial action or taken on the basis of “a minimum or no

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<sup>46</sup> RAAL § 518.

<sup>47</sup> MSAPA § 311. A guidance document is “a record of general applicability developed by an agency which lacks the force of law but states the agency’s current approach to, or interpretation of, law, or describes how and when the agency will exercise discretionary functions.” Guidance documents do not include documents pertaining to the internal management of an agency or interagency agreements and communications which do not affect “private rights or procedures available to the public,” opinions of the attorney general, or criteria or guidelines used in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or defending, prosecuting, or settling cases, “if disclosure of the criteria or guidelines would enable persons violating the law to avoid detection, facilitate disregard of requirements imposed by law, or give an improper advantage to persons that are in an adverse position to the state.”

<sup>48</sup> 2 Pa.C.S. § 704.

administrative record,” the amendments allow courts to receive evidence relating to the agency’s basis for taking action. The amendments also allow courts to supervise the compilation of the agency record and to allow discovery or other evidentiary proceedings that will allow the consideration of record outside the agency record to (1) ensure the completeness of the agency record, (2) adjudicate allegations of procedural error not discussed in the record; or (3) “prevent manifest injustice.”<sup>49</sup>

## **H. Judicial Review**

The proposed amendments provide a number of important modifications and clarifications regarding the judicial review of final agency actions.

Codifying the collateral order doctrine, the amendments provide for review of non-final agency actions if postponement of judicial review would result in an inadequate remedy or irreparable harm that outweighs the public benefit derived from postponing judicial review.<sup>50</sup> This is a more expansive statement of doctrine than set forth in Pa.R.A.P. 313, which provides for the review of collateral orders “where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.”

The amendments also clarify the scope of judicial review of agency actions in enforcement proceedings. Consistent with Pa.R.A.P. 3761 and *PA Human Relations Commission v. School District of Philadelphia*, 447 Pa. 126, 732 A.2d 578 (1999), the amendments provide for appellate review of enforcement proceedings, but further stipulate that when agencies initiate civil or criminal proceedings for enforcement, “except to the extent that [a] prior, adequate, and exclusive opportunity for judicial review is available . . . , final agency action is subject to judicial review in civil and criminal proceedings for judicial enforcement.”<sup>51</sup>

The amendments also modify existing rules regarding requests for stays of agency orders pending appeal. Unlike Pa.R.A.P. 1781 which provides that an application for a stay must demonstrate that “application to the government unit for the relief sought is not practicable, or that the application . . . has been made and denied,” the amendments allow a reviewing court to grant a stay regardless of whether the challenging party first sought a stay from the agency.<sup>52</sup>

## **Issues to Resolve in Updating the Administrative Agency Law**

Notwithstanding the improvements that can be made to existing Pennsylvania law by updating the Administrative Agency Law using the Revised MSPAPA, prior to consideration of the legislation, consideration should be given to whether revisions are needed to conform the Act to unique Pennsylvania constitutional and statutory requirements, and reasonably well-functioning historical practices. Because the draft legislation is modeled only on the adjudicative

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<sup>49</sup> RAAL § 707.

<sup>50</sup> RAAL § 701(b).

<sup>51</sup> RAAL § 702(b).

<sup>52</sup> RAAL § 704.

provisions of the Revised MASPA, and fails to take into consideration some other provisions of the MSAPA that affect adjudicative practices and the scope of judicial review, consideration should also be given to whether to incorporate into the legislation some of these other provisions of the MSAPA, especially those concerning guidance documents. Finally, decisions should be made about whether to incorporate into the legislation some other optional provisions of the Revised MSAPA. Some of the principle issues in which these issues arise are discussed below.

#### **A. Exceptions and Modifications**

Currently the Administrative Agency Law does not apply to proceeding relating to taxes, elections, certain actions of the Department of Transportation, and student discipline.<sup>53</sup> In addition, a number of other statutory provisions modify or provide exemptions from the Administrative Agency Law with respect to particular agencies or proceedings, including matters involving automobile insurance renewals,<sup>54</sup> community college audits,<sup>55</sup> confidentiality determinations of the Department of Banking,<sup>56</sup> initial agency decisions regarding contract disputes,<sup>57</sup> gaming,<sup>58</sup> health care facility assessments by the Department of Public Welfare,<sup>59</sup> Medicaid providing disputes,<sup>60</sup> prison inmates,<sup>61</sup> procurement disputes,<sup>62</sup> right to know controversies,<sup>63</sup> small games of chance,<sup>64</sup> and student loans.<sup>65</sup>

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<sup>53</sup> 2 Pa.C.S. § 501(b). The actions of the Department of Transportation not subject to the AAL are decisions relating to the issuance of miscellaneous registration plates, the denial of drivers' licenses, the suspension of inspection station certificates, and the suspension of salvor's authorizations. 75 Pa.C.S. §§ 1377, 1550, 4724 & 7503.

<sup>54</sup> 40 P.S. § 991.2011 providing that decisions of the Insurance Commissioner "shall be subject to appeal in accordance with 2 Pa.C.S. Ch. 7 Subch. A ..., but the court hearing an appeal shall not decline to affirm a decision on the ground that the requirements of 2 Pa.C.S. Ch. 5 Subch. A were not fulfilled."

<sup>55</sup> 24 P.S. § 19-1913-A(k)(2) providing that decisions of the Secretary of Education resolving audit findings "shall not be subject to the provisions of 2 Pa.C.S."

<sup>56</sup> 71 P.S. § 733-503(E)(5), (6) & (8).

<sup>57</sup> 62 Pa.C.S. § 1712.1(f) providing that "the provisions of 2 Pa.C.S. shall not apply to" pre-litigation determinations of agency contracting officers subject to subsequent review by the Board of Claims.

<sup>58</sup> 4 Pa.C.S. §§ 1204 & 1205 modifying the application of 2 Pa.C.S. §§ 504 & 505 (allowing documentary hearings "where constitutionally permissible) and Art. 7 (requiring the Supreme Court to affirm all final orders involving slot machines and table games operation unless the Gaming Control Board "committed an error of law or that the order, determination or decision of the board was arbitrary and there was a capricious disregard of the evidence.")

<sup>59</sup> 62 P.S. §§ 805-A, 803-G, & 805-C providing that the Secretary of Public Welfare's determinations regarding assessments for nursing facilities, intermediate care facilities, and hospitals "shall not be subject to administrative or judicial review under 2 Pa.C.S. Chs. 5 Subch. A ... and 7 Subch. A."

<sup>60</sup> 67 Pa.C.S. § 1102(e) requiring that in addition to the requirements of the AAL hearing officers shall act independently of officials of the Department of Public Welfare whose decisions are subject to review, not engage in ex parte communications, conduct prompt adjudications, consolidate proceedings, and index and publish decisions.

<sup>61</sup> 61 Pa.C.S. § 5904 providing that the AAL shall not apply to the assessment of costs to inmates relating to violations of prison rules.

<sup>62</sup> 62 Pa.C.S. § 1711.1(l) providing that "the provisions of 2 Pa.C.S. shall not apply" to protests of solicitations and awards "

<sup>63</sup> 65 P.S. § 67.1309 providing that for purposes of judicial review " the provisions of 2 Pa.C.S. shall not apply ... unless specifically adopted by regulation or policy."

In amending the Administrative Agency Law careful consideration should be given regarding whether to continue these existing exemptions or modifications of the requirements of the law in whole or in part, particularly with respect to core provisions of the Administrative Agency Law which are designed to protect the fairness and impartiality of agency adjudications. In particular, consideration should be given to whether to apply to all agency adjudications requirements pertaining to the impartiality and independence of presiding officers and final decision makers; notice to affected persons regarding agency actions subject to review; restrictions on ex parte communications, and provisions establishing, and allowing modification of, the agency record.

**B. Updating the General and Special Administrative Rules**

The MSAPA contains provisions not incorporated into the current draft which authorize an appropriate state agency to adopt rules of procedure applicable to all agencies, subject to the right of agencies to modify the general rules in a manner not inconsistent with statutory requirements.

In a manner similar to Pennsylvania practice, the MSAPA provides for the designation of a single state agency with the responsibility to adopt “standard procedural rules” implementing the Act to be used by agencies, which may be supplemented by rules adopted by individual agencies containing provisions not inconsistent with the Act.<sup>66</sup> Unlike the MSAPA, however, Pennsylvania lacks clear statutory authority for the Joint Documents Committee to adopt procedural rules, and the General Administrative Rules may be superseded by inconsistent regulations adopted by individual agencies.

At a minimum, in revising the Administrative Agency Law, it seems necessary to clearly confer authority on the Joint Documents Committee, or some other appropriate entity, to adopt and revise the General Administrative Rules. Consideration should also be given to requiring the establishment of broadly representative advisory committees to offer advice to the agency responsible for the General Administrative Rules regarding revisions appropriate to conform to amendments to the Administrative Agency Law.

To the extent new provisions of the Administrative Agency Law are inconsistent with the General Administrative Rules, or with special procedural rules adopted by agencies which waive or modify provisions of the General Administrative Rules, timetables and procedures should be established to revise the general and special rules in a reasonably expeditious fashion.

Consideration should also be given to the extent to which agencies are authorized to modify the General Administrative Rules. At a minimum, any revisions of the General Administrative Rules should be adopted pursuant to notice and comment rulemaking, and not exercised on a case-by-case basis. It may also be worthwhile to direct the entity responsible for

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<sup>64</sup> 4 Pa.C.S. § 13A14 modifying the application of 2 Pa.C.S. § 504 to allow documentary hearings.

<sup>65</sup> 24 P.S. § 5104.3(h)(4) providing for de novo hearings

<sup>66</sup> MSAPA § 205.

updating the General Administrative Rules to designate core provisions that may not be modified by individual agencies.

To facilitate the updating of individual agency rules of procedure which modify the General Administrative Rules, a date for mandatory application of amendments to the Administrative Agency Law to individual agency proceedings should also be established with sufficient lead time to allow meaningful evaluation and the solicitation of public comments regarding new agency rules.

### **C. Role of Agency Heads**

The Revised Model State Administrative Procedures Act contains optional provisions adopted for states with central hearing panels which appoint and supervise hearing officers, including hearing officers authorized by state law to take final agency actions.<sup>67</sup>

For Pennsylvania agencies without professional and independent hearing officers, consideration should be given at a minimum to creating an agency with authority to appoint, supervise and trail hearing officers. A key function of such an agency should be to provide continuing education and create a code of conduct for hearing officers.<sup>68</sup>

Consideration should also be given to whether it is appropriate to continue the role of agency heads in reviewing recommended decisions of hearing officers. Much of the dissatisfaction with administrative law stems from the perception that agency adjudications are fundamentally unfair and that policy making and political factors sometimes improperly influence agency actions. These concerns are particularly profound when applied to the role of agency heads as final decision makers because of the inherent and unavoidable commingling of policy making, prosecutorial, supervisory and political responsibilities in agency heads. In addition, the practical difficulties of applying and enforcing restrictions on *ex parte* communications upon agency heads creates perceptions that a heavy hand often tilts the scale of justice.

### **D. Rights to Administrative Hearings**

As a result of the 1968 Constitutional Convention, Pennsylvania adopted a constitutional amendment providing a right of review of agency actions either by a court of record or an appellate court as provided by law.<sup>69</sup> To implement this constitutional amendment, the Administrative Agency Law was amended in 1972 to provide that no agency adjudication shall be valid as to any party unless the party is afforded reasonable opportunity and an opportunity to be heard as provided by the statute.<sup>70</sup> In this context, the term “party” is defined to mean Any

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<sup>67</sup> MSAPA Art. 6.

<sup>68</sup> MSAPA § 604.

<sup>69</sup> Constitution of Pennsylvania, Art. V, § 9.

<sup>70</sup> 2 Pa.C.S. § 504.

person who appears in a proceeding before an agency who has a direct interest in the subject matter of such proceeding.<sup>71</sup>

The judicial review provisions of the Administrative Agency Law also apply to all agencies subject to the law “regardless of the fact that a statute expressly provides that there shall be no appeal from an adjudication of an agency, or that the adjudication of the agency shall be final and conclusive.”<sup>72</sup> These provisions of the Administrative Agency Law were a method to stipulate that the right of appeal would generally be to an appellate court, rather than a court of record, and were intended to eliminate uncertainties regarding the extent to which constitutional due process requires a right to hearing regarding agency actions, and whether agency actions are subject to judicial review.

The Revised MSAPA was drafted from a fundamentally different perspective in which the role of the Act, consistent with the federal practice and the practice in most other states, was to establish procedural rules to apply when statutory or constitutional requirements otherwise mandate an administrative hearing. As a result, the term “contested case,” as defined in the MSAPA and currently incorporated into draft amendments to the Administrative Agency Law, means, “An adjudication in which an opportunity for an evidentiary hearing is required by the Constitution of the United States, a Federal statute, the Constitution of Pennsylvania, or a statute [of Pennsylvania].”<sup>73</sup> While the term “contested case” is not used in the adjudicative provisions of the amendments to the Administrative Agency Law, the term is used to identify circumstances in which agency findings of fact must be supported by substantial evidence, thereby limiting significantly to extent to which agency factual determinations are subject to judicial review.<sup>74</sup>

Careful consideration needs to be given regarding whether it is appropriate to continue to follow long-established Pennsylvania

### **E. Standing**

The amendments grant standing to intervene in agency adjudications and to pursue appeals to any person aggrieved or adversely affected by the agency action and to a person granted standing under any other law.<sup>75</sup> While these rules are consistent with current provisions of the Administrative Agency Law, they do not take into consideration the ability of agencies by regulation to designate parties eligible to participate in agency adjudications and deemed adversely affected by agency actions; the right of all parties to proceedings before an agency to intervene into an appeal provided as by Pa.R.A.P. 1531(a); the ability of agencies to designate parties entitled to standing in particular proceedings as necessary to protect the “public interest” as recognized by the General Administrative Rules, or “taxpayer standing” under *In re Application of Biester*, 487 Pa. 438, 409 A.2d 848, 851 (1979) and its progeny. As a result, a broader set of standing rules consistent with current Pennsylvania practice should be considered.

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<sup>71</sup> 2 Pa.C.S. § 101.

<sup>72</sup> 2 Pa.C.S. § 701(a).

<sup>73</sup> RAAL § 101.

<sup>74</sup> RAAL § 703(a)(3)(iv).

<sup>75</sup> RAAL §§ 509 & 705.

**F. Scope of Judicial Review When Record is Supplemented**

Clarification is required regarding the scope of judicial review when the record is supplemented. In particular, consideration needs to be given to whether in these circumstances if a matter is not remanded to an agency for further consideration, the scope of judicial review of a matter should be *de novo* as occurs under the Municipalities Planning Code when additional information is considered by a court reviewing the decisions of a zoning hearing board or the governing body of a municipality.<sup>76</sup>

**Conclusion**

Updating the Administrative Agency Law will be a challenging process that requires careful deliberations from a multiple perspectives. These challenges, however, should not dissuade members of the bar and agency representatives from undertaking efforts to update statutes and rules that have not been reviewed or revised since at least 1968. While the judiciary has done an admirable job of supplementing the Administrative Agency Law and the General Administrative Rules with a well-developed and continuously emerging body of common law, the issues and principles are sufficiently important to warrant legislative direction regarding the fundamental principles of administrative law.

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<sup>76</sup> 53 P.S. § 11005-A.