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Timothy W. Glidden

Albert E. Utton

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AN ADMINISTRATIVE PROCEDURE ACT FOR NEW MEXICO

TIMOTHY W. GLIDDEN* AND ALBERT E. UTTON†

The geometric growth of state administrative agencies during the past half century has drastically changed the face of state government in the United States.¹ In spite of this fact, legislation directed toward the control of state administrative agency actions has been slow and in some situations nonexistent. Since North Dakota enacted its landmark administrative procedure legislation in 1941,² state bars, law school faculties and various other interested groups have taken the initiative in advocating the adoption of state administrative procedure acts³ with varying results.⁴ The State of New Mexico is unique in this respect in that no effort has been made on any level toward the adoption of uniform administrative procedure legislation.⁵

* Articles Editor, *Natural Resources Journal*, 1966-67.

† Associate Professor of Law, University of New Mexico, Albuquerque.

1. See K. Davis, *Administrative Law* (1965 Ed.).

2. See Hoyt, *North Dakota Leads in Administrative Law Field*, 25 J. Am. Jud. Soc'y 114 (1941).

3. For various past approaches taken in this nationwide campaign see Sullivan, *The Case for an Administrative Procedure Act*, 21 Mont. L. Rev. 168 (1960); Davis, *An Administrative Procedure Act for Arizona*, 2 Arizona L. Rev. 17 (1960); Harris, *An Administrative Procedure Act for Texas*, 5 Sw. L.J. 125 (1951); Schwartz, *An Administrative Procedure Act for New York*, 24 N.Y.U.L.Q. Rev. 55 (1949); Smith, *An Administrative Procedure Code for Kansas*, 16 Kan. B.J. 157 (1947).

4. For an analysis of current state administrative procedure legislation see 49 Cornell L.Q. 634 (1964). That publication is only current through 1964 and obviously does not refer to such recent legislation as Idaho's Administrative Procedure Act, Idaho Code Ann. § 67-52 (1966).

5. The current state of administrative procedure in some New Mexico agencies is exemplified by the recent case of *Garnand v. Upton*, 77 N.M. 132, 419 P.2d 972 (1966). There the Garnand party was seeking approval of articles of incorporation for a mutual building and loan association from the Commissioner of Banking for the State of New Mexico. The articles of incorporation were originally filed for approval with the Commissioner in May of 1964. A formal written application requesting approval was filed with the Commissioner on July 14, 1964. On December 24, 1964, approximately seven months after the articles were filed for approval, the Garnand party learned for the first time that approval was being withheld for reasons partially involving the proposed name of the association. In effect, the Garnand party was forced to seek the issuance of an alternative writ of mandamus to discover all of the reasons for the failure to approve the articles. The Commissioner of Banking testified that his judgment, concerning the name involved, had "been formed over a period of five months." (District court record p. 88.) In short, the administrative procedure followed by the state agency in 1964 in processing the request, was minimal, if existent at all. In the Garnand case the Commissioner of Banking was ordered by the Supreme Court of New Mexico to approve the Garnand request. The number of similar agency decisions which

New Mexico's Constitution creates the following boards and commissions: the State Highway Commission;⁶ the State Corporation Commission;⁷ the State Board of Education;⁸ the State Department of Public Education;⁹ the Boards of Regents,¹⁰ and the Department of Agriculture.¹¹ Legislatively created administrative agencies of major importance include the Oil Conservation Commission,¹² the Public Service Commission,¹³ the State Engineer,¹⁴ and the Division of Liquor Control.¹⁵

The scope alone of the powers delegated to the Board of Regents of the College of Agriculture and Mechanical Arts demonstrates the need for administrative procedure legislation in New Mexico.¹⁶ This Board, among other things, has the power to make determinations of standards for some agricultural products and to seize substandard products,¹⁷ to license fumigation companies,¹⁸ to register and hold hearings concerning "economic poisons,"¹⁹ to issue stop-sale orders on seeds,²⁰ to cancel fertilizer registrations,²¹ and to appoint a director of the Cotton District Act who in turn is authorized to hold certain hearings.²²

presently are not appealed to state courts, due to lack of legislation allowing judicial review or for one of numerous other reasons, can only be speculated upon. Also see note 15 *infra*.

6. N.M. Const. art. V, § 14.

7. *Id.* art. XI, § 1.

8. *Id.* art. XII, § 6.

9. *Id.*

10. *Id.* art. XII, § 13.

11. *Id.* art. XV, § 1.

12. N.M. Stat. Ann. § 65-3-4 (Repl. 1966). Among recent cases related to the actions of this agency is *Continental Oil Co. v. Oil Conservation Commission*, 70 N.M. 310, 373 P.2d 809 (1962).

13. N.M. Stat. Ann. § 68-4-1 (Repl. 1966). Two cases discussing the powers of this Commission are *Smith v. Southern Union Gas Co.*, 58 N.M. 197, 269 P.2d 745 (1954) and *Potash Co. of America v. New Mexico Pub. Serv. Comm'n*, 62 N.M. 1, 303 P.2d 908 (1956).

14. N.M. Stat. Ann. § 75-2-1 (1953). For a detailed analysis of the duties and powers of the State Engineer see R. Clark, *New Mexico Water Law Since 1955*, 2 Natural Resources J. 484 (1962).

15. N.M. Stat. Ann. § 46-2-2 (Repl. 1966). For a discussion of the duties of the chief of liquor control see *Kearns v. Aragon*, 65 N.M. 119, 333 P.2d 607 (1958).

16. At the opposite end of the delegation of powers spectrum in the agricultural area is the "state grasshopper control board." N.M. Stat. Ann. § 45-8-15 (Supp. 1965).

17. N.M. Stat. Ann. § 45-18-4 (Repl. 1966).

18. N.M. Stat. Ann. § 45-8-9 (Repl. 1966).

19. N.M. Stat. Ann. § 45-9-4 (Repl. 1966).

20. N.M. Stat. Ann. § 45-12-16 (Repl. 1966).

21. N.M. Stat. Ann. § 45-13-25 (Repl. 1966).

22. N.M. Stat. Ann. § 45-24-4 (Repl. 1966).

The lack of uniform regulatory legislation concerning the actions of the aforementioned New Mexico administrative agencies is of obvious detriment to individuals whose rights are affected by these actions. The solution lies in an administrative procedure act. It is the intention of the authors of this article to take an initial step toward the enactment of an administrative procedure act for New Mexico by proposing an entire act, together with necessary comments, based upon model acts and existing legislation in other states.

The Revised Model State Administrative Procedure Act has provided the basis for a major portion of the legislation proposed herein. This model act has its genesis in a 1937 report by the President's Committee on Administrative Management.²³ This federally oriented document strongly criticized existent practices common to federal administrative agencies. A subsequent report was made in 1941 by the Attorney General's Committee on Administrative Procedure which offered the nation a detailed explanation of federal administrative procedure.²⁴ During the Attorney General's Committee study, legislation, passed by Congress and then vetoed by President Roosevelt,²⁵ brought to the attention of the American public the importance of administrative procedure and the concomitant need for control of that procedure. After an interruption by World War II, a minority report of this Committee provided Congress with the material which ultimately led to the enactment of the Federal Administrative Procedure Act.²⁶

The interest generated by the 1941 Attorney General's Committee report and the resultant Congressional legislation was accompanied by a realization that state administrative agencies were also in need of regulation. This realization culminated in the approval of a Model State Administrative Procedure Act by the National Conference of Commissioners on Uniform State Laws in 1946.²⁷ This model act was revised and up-dated by the Commission on Uniform

23. President's Comm. on Administrative Management, Report with Special Studies (1937).

24. Attorney General's Comm. on Administrative Procedure, Final Report (1941).

25. The Walter Logan Administrative Procedure Bill of 1939 was vetoed by President Roosevelt allegedly because he wanted to include the recommendations of the then incomplete Attorney General's report in administrative procedure legislation. H. Doc. No. 986, 76th Cong., 3rd Sess. 3-4 (1940).

26. 5 U.S.C. §§ 1001-14 (1958), as amended (Supp. I, 1965).

27. Handbook of the National Conference of Commissioners on Uniform State Laws, 201 (1961) [hereinafter cited as MSAPA].

State Laws in 1961 and is now referred to as the Revised Model State Administrative Procedure Act.²⁸

Various states have employed these model acts in enacting legislation to govern their state administrative agencies.²⁹ During the past quarter of a century since initial state legislation in North Dakota,³⁰ New Mexico's legislature has not made an effort to regulate the conduct of its state administrative agencies through uniform legislation applicable to all state agencies. Instead, past legislatures have chosen to regulate the actions of state agencies on a piecemeal basis.³¹ This outdated method of regulation has recently come under criticism by various members of the New Mexico State Legislature. This criticism was recently embodied in Senate Joint Memorial Number Ten, "A Joint Memorial requesting the Legislative Council to direct the legislative council service to prepare the draft of an administrative procedure act to govern proceedings of administrative agencies of the state."³²

It is the object of this article to provide the New Mexico legislature with a basic administrative procedure act adopted to the needs of existent New Mexico state administrative agencies.³³

The twin goals of the proposed act are to assure that all agencies observe minimum requirements of fairness, and to establish uniformity in the procedures to be followed by the agencies in carrying out their legislative and judicial functions. As Professors Curran and Sacks of Harvard pointed out in regard to the Massachusetts Administrative Act, the goal of fairness is the more fundamental of the two: "Fair procedure is a necessity. Uniformity of procedure is

28. See K. Davis, *Administrative Law*, 575 (1965 Ed.); P. Cooper, *State Administrative Law*, 797 (1965) [hereinafter cited as RMSAPA].

29. See Comment, *Administrative Procedure Legislation Among the States*, 49 Cornell L.Q. 634 (1964).

30. N.D. Cent. Code §§ 28-32-01 to -22 (1960).

31. For examples of such legislation see New Mexico's Liquor Control Act, N.M. Stat. Ann. §§ 46-1-1 to -12-12 (Repl. 1966); Appeals from State Engineer, N.M. Stat. Ann. §§ 75-6-1 to -3 (1953); Uniform Licensing Act, N.M. Stat. Ann. §§ 67-26-1 to -28 (Repl. 1961).

32. Senate Joint Memorial No. 10, First Session, Twenty-Eighth Legislature. This memorial states, in part, that "there are no standardized procedures to govern the conduct of administrative hearings by state agencies, boards, bureaus, commissions and institutions in New Mexico; and . . . much confusion exists because of a multitude of varying practices and procedures in the conduct of such administrative hearings. . . ."

33. An effort has been made to follow the basic concepts concerning administrative procedure existent in such legislation as the New Mexico Uniform Licensing Act, *supra* note 14. It is not anticipated that the reorganization of the administrative branch of the New Mexico government, currently proposed by Governor David F. Cargo, will require any significant changes in the Act proposed herein.

desirable to the extent that it is obtainable for a myriad of diverse agencies. To a considerable extent, uniformity is achieved as a by-product of a code of minimum procedural requirements."³⁴ Thus, the prime goal of this act is to establish a set of minimum standards of basic fairness below which no agency will be allowed to descend, while at the same time leaving room for considerable individual differences between agencies above the minimal standard.³⁵ In rule-making proceedings, all parties are to be given notice and opportunity to be heard. In conducting adjudicatory proceedings, agencies are required to give reasonable notice, opportunity to know and meet the evidence in opposition, and to cross-examine opposing witnesses. Agencies are required to base their decisions on evidence "on the record," and give reasons for their decisions. The act also establishes uniform appeal procedures and uniform standards for judicial review of administrative decisions.

The act is organized in the typical four-part structure: 1) definitions (Section 2); 2) rule-making (Sections 3 through 9); 3) adjudicatory proceedings (Sections 10 through 17); and 4) judicial review (Sections 18 through 25).

I

DEFINITIONS

One of the foremost requirements of an effective administrative procedure act is that it maintain a delicate balance in accomplishing two purposes. On one hand it must govern those agencies which are concerned with and have a significant amount of control over private individual rights; on the other, it must not hamstring agencies which exercise purely discretionary functions. The key to this balance lies in the act's definitions. The term "agency" is of primary importance in that it determines the scope of the entire act. The exclusionary approach³⁶ to this key definition has been chosen in an effort to insure that all applicable existing or future administrative agencies in

34. Curran and Sacks, *Massachusetts Administrative Procedure Act*, 37 Boston U.L.Rev. 70, 97 (1957).

35. *Id.* at 76.

36. Under the exclusionary approach, only those agencies specifically named in the act are excluded from its scope. This form of definition prevents the cumbersome requirement of amending the act every time a new commission is created which should be governed by the proposed legislation. It also requires some consideration to be given to any attempt to have an existing or newly created agency excluded from the act, a safeguard meant to protect the rights of the individual through the application of the act wherever possible.

the state will be subject to the requirements set forth in the act.

The terms "adjudicatory proceeding," "license," "licensing," "party," "person," and "rule" have been defined largely according to recommendations included in the Revised Model State Administrative Procedure Act.³⁷ We are also particularly in debt to the Massachusetts Administrative Procedure Act³⁸ and the valuable comments of Kenneth Culp Davis.³⁹

The threshold question that must be answered in determining what type hearing applies is found in Section 1 in the definition of "adjudicatory proceeding" and "rule."

The definition of "rule" substantially follows that of the Massachusetts Act which is among the most comprehensive enacted by the states. The definition was intentionally drafted broadly in order to "make it clear that directives or bulletins issued by agencies may be included even though they are not entitled regulations."⁴⁰ Excluded from the definition are advisory rulings. Advisory rulings are a valuable practice that allows agencies to informally advise individuals of the effect of statutes and regulations administered by the agency. Interpretive rules are included in the definition but are not compulsorily subject to the notice and hearing provisions of Section 3 in order to avoid discouraging the free use of interpretive rulings. Professor Davis states:

One of the major failings of many agencies is reluctance to clarify the law they administer. Everything should be done that can be done to encourage agencies to move toward earlier clarification. Two of the main methods that should be encouraged are interpretive rules and general statements of policy. Good legislation should avoid any kind of new barriers to issuance of interpretative rules and general statements of policy.⁴¹

Thus although agencies are free to elect to go through the rule-making procedures in order to issue an interpretive ruling, they are not forced to do so; but each agency is required to make available for public inspection and file with the public records administrator all rules including interpretive rules. Also excluded from the definition are those rules and regulations concerned only with internal management of the agency itself. Following the Massachusetts ex-

37. RMSAPA § 1.

38. Mass. Gen. Laws Ann. ch. 30A, §§ 1-17 (1961).

39. K. Davis, *Administrative Law: Cases-Text-Problems*, 581 (1965).

40. Curran and Sacks, *supra* note 34, at 70.

41. Davis, *supra* note 39, at 583.

ample, the definition of "rule" does not include those regulations which concern the operation of the state's penal, educational or health and welfare institutions. These regulations are related to those of internal management.⁴² The model act also excluded "inter-agency memoranda,"⁴³ but we have chosen not to use this exclusion because that would exempt such memoranda from the procedural requirements for rule-making in general. This was done consciously in order to avoid any agency's tendency to maintain a system of secret law. Agencies often administer rather vague statutory provisions, and, rather than clarifying them through regular rule-making procedures, sometimes tend to clarify these statutes through instructions to staff and "intra-agency memoranda" which are very often confidential and thereby not available to interested parties.⁴⁴ This act in general is based on a philosophy of openness and disclosure to those affected by agency action; that it is desirable for agencies to promulgate openly and in advance the rules under which they operate so that all may know them, unless there are good reasons for not doing so.

BE IT ENACTED BY THE LEGISLATURE OF THE
STATE OF NEW MEXICO:

Section 1. [NEW MATERIAL] SHORT TITLE.—This act may be cited as the "Administrative Procedure Act."

Section 2. [NEW MATERIAL] DEFINITIONS.—As used in the Administrative Procedure Act:

A. "Agency" means each state board, commission, department, or officer authorized by law to make rules or to conduct adjudicatory proceedings, except:

- (1) the legislature or any branch, committee or officer thereof;
- (2) the courts; and
- (3) the state board of probation and parole;

B. "Adjudicatory proceeding" means a proceeding including but not restricted to rate-making and licensing, before an agency, in

42. Mass. Gen. Laws Ann. ch. 30A, § 1(5).

43. RMSAPA § 1(7); Reproduced in Davis, *supra* note 39, at 575.

44. Davis, *supra* note 39, at 581; contra 1 F. Cooper, *State Administrative Law* 109 (1965).

which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for a trial-type hearing, but it does not include a rule-making proceeding as provided in Section 3 herein;

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

D. "Licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license;

E. "Party" means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party;

F. "Person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency;

G. "Rule" includes the whole or any part of every regulation, standard or other requirement of general application adopted by an agency to implement or interpret the law enforced or administered by it, but does not include (a) advisory rulings issued under Section 9, or (b) regulations concerning the only internal management or discipline of the adopting agency or any other agency, and not directly affecting the rights of or the procedures available to the public, or (c) regulations concerning the only operation and internal management or discipline of state penal, correctional, welfare, educational, public health and mental health institutions; or (d) regulations relating to the use of highways and streets when the substance of such regulations is indicated to the public by means of signs or signals; or (e) decisions issued in adjudicatory proceedings.

II

RULE MAKING PROCEDURE

The fundamental "rule-making/adjudication dichotomy," referred to in almost every discussion of an administrative procedure act, is incorporated into the legislation proposed here. This fundamental distinction between rule-making or legislating and adjudicating is reflected in the two different types of hearings that are provided for in the proposed act. The hearing provided for rule-mak-

ing is an argument-type hearing, as opposed to the trial-type hearing provided for in adjudicatory proceedings. The hearing which gives the parties an opportunity to present their views and arguments is appropriate for the rule-making process, whereas in the adjudicatory proceeding (where an individual is alleged to have done or not done a particular act) the trial-type hearing is mandatory in order to give each party the opportunity to know and meet the evidence against him by presenting rebuttal evidence of a written or oral nature, and to cross-examine opposing witnesses. This is the distinction between the proceedings to determine the allegation "licensee sold liquor to minors" and a proceeding to determine whether, as a matter of policy, we should sell liquor to minors. Where a person has been charged with selling liquor to minors, an adjudicatory proceeding is required so that the accused will have an opportunity to know and meet the evidence against him by presenting refutation evidence and cross-examining the witness against him. On the other hand, in determining the legislative policy issue—whether to sell liquor to minors—the hearing should be of a rule-making type wherein the parties are given an opportunity to present their arguments, and evidence supporting those arguments, concerning the proposed policy. Thus, the proposed act provides two different types of hearings: an argument-type hearing for rule making, and a trial-type hearing for adjudicatory proceedings. As Professor Davis points out:

of great consequence is the rather elementary proposition that the method of trial is designed for resolving issues of fact, and that the method of argument, not the method of trial, is normally the appropriate oral process for resolving non-factual issues of law and policy and discretion. It is because appellate courts are typically concerned with issues of law and policy, not with issues of fact, that the typical procedure before appellate courts is that of argument, not that of trial.⁴⁵

The trial-type hearing is not called for unless facts are in dispute. The position has been clearly stated by our own 10th Circuit:

. . . it is fundamental to the law that the submission of evidence is not required to characterize "a full hearing" where such evidence is immaterial to the issue to be decided Where no genuine or

45. K. Davis, *Administrative Law Text* 114 (1959).

material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument.⁴⁶

To avoid further confusion, it is desirable to point out that different types of facts are developed at different hearings. Davis uses the terminology "legislative facts" and "adjudicative facts." He defines adjudicative facts as "facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the question of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to the jury in a jury case."⁴⁷ He points out that legislative facts "do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy, and discretion."⁴⁸ Thus, facts are presented in both rule-making and adjudication, but in different ways. If the facts are what Davis calls "adjudicative facts," we need a trial-type hearing so that the person charged is given ample opportunity to know and meet the evidence against him by cross-examination and the presentation of his own evidence in order to prove "who did what, where, when, how, why, and with what motive or intent." That is to say, did the liquor licensee in fact sell liquor to a minor? If so, who was it, where was it, when was it, and how was it done? On the other hand, in deciding whether liquor should be sold to minors, a legislative or rule-making hearing is required in which all sorts of arguments and facts may be presented concerning such matters as problems of enforcing the law, the maturity of minors, and legislative facts gained by statistical and sociological studies of the psychological impact upon minors of denying them the right to buy liquor. These are the types of facts developed through argument; no one would suggest that the liquor licensee is entitled to a trial-type hearing on the question of whether we should change the law so as to permit the sale of liquor to minors.

Now we direct our attention to particular features of the proposed act. Section 3 requires all agencies within the scope of the act to promulgate rules concerning both formal and informal procedures.⁴⁹ This section also provides for public inspection of these

46. *Producers' Livestock Marketing Assn. v. U.S.*, 241 F.2d 192, 196 (1957).

47. Davis, *supra* note 39, at 116.

48. *Id.*

49. Note should be taken of the fact that this proposed legislation is not merely a set of guidelines. It imposes an affirmative duty upon agencies within the scope of the Act.

rules, statements and interpretations,⁵⁰ as well as all agency decisions, orders and opinions.

Section 3. [NEW MATERIAL] RULE-MAKING REQUIREMENTS.—A. In addition to other rule-making requirements imposed by law, each agency shall:

(1) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available;

(2) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;

(3) make available for public inspection all final orders, decisions, and opinions issued after the effective date of this legislation, together with all materials that were before the deciding officers at the time the decision was made, except materials properly for good cause held confidential.

B. No agency rule, order, or decision, issued after the effective date of this legislation, is valid or effective against any person or party until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof.

Comments on Section 4

Fairness and procedural due process require that a basic rule adoption procedure be included in an administrative procedure act. Section 4 proposed herein formulates procedures by which notice and hearings are afforded to all individuals having an interest in the adoption, amendment or repeal of agency rules.⁵¹

No formal procedures for the rule-making hearings are established so that there may be variations to fit different agency situations, but the minimum standard of affording all interested persons opportunity to present their arguments is preserved.

We have gone considerably beyond the model act in our notice requirements,⁵² and have followed the lead of the Massachusetts Ad-

50. Section 6 of the proposed act, *infra*, further elaborates upon the topic of public inspection.

51. The twenty-five person requirement and the emergency clause in Section 3 of the RMSAPA are felt to be unnecessary and consequently have been deleted from the proposed Act.

52. RMSAPA § 9.

ministrative Procedure Act.⁵³ Where agencies are required to publish notice and no particular method is prescribed by law, publication of the rule-making hearing is required not only in newspapers, but in trade, industry, or professional publications. Also, notice is required to any person who has asked that notice be given him, and under this provision the agency is required to keep a list of all those who request receipt of all agency notices. This is a novel Massachusetts concept, but experience has shown that special interest groups with a continuing interest in the work and regulations of a particular agency can thus be assured of being kept abreast of that agency's action.

This proposed act seeks to establish a uniform procedure that can serve as a general standard, but it also allows for some variation. For example, if an emergency situation presents itself whereby the notice period must be shortened to preserve the "public health, safety or general welfare," the usual notice provisions can be altered but the agency is required to make a statement of its reasons for doing so.⁵⁴ Also, as a further safeguard, emergency regulations are limited in the duration of their effectiveness to three months. If the agency wants the emergency amendment to continue in effect, it is required to go through the usual notice and hearing requirements of the rule-making section.

Section 4. [NEW MATERIAL] RULE-MAKING PRE-REQUISITES.—A. Prior to the adoption, amendment, or repeal of any rule, the agency shall:

(1) within the time specified by any law, or if no time is specified, then at least twenty days prior to its proposed action, (a) publish notice of its proposed action in such manner as is specified by any law, or if no manner is specified then in such newspapers, and, where appropriate, in such trade, industry or professional publications as the agency may select, and (b) notify any person specified by any law and, in addition, any person or group filing written request, such request to be renewed yearly in December, for notice of proposed action which may affect that person or group, notification being by mail or otherwise to the last address specified by the person or group. The notice shall (a) refer to the statutory authority under which the action is proposed, (b) give the time and place of any

53. Mass. Gen. Laws Ann. ch. 30A, § 3.

54. § 4B.

public hearing or state the manner in which data, views or arguments may be submitted to the agency by any interested person, (c) either state the express terms or describe the substance of the proposed action, or state the subjects and issues involved, and (d) include any additional matter required by any law;

(2) afford all interested persons reasonable opportunity to submit data views, or arguments, orally or in writing. If the agency finds that oral presentation is unnecessary or impracticable, it may require that presentation be made in writing. The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, the agency shall issue a concise statement of its principal reasons for adoption of the rule.

B. If the agency finds that immediate adoption or amendment of a regulation is necessary for the preservation of the public health, safety or general welfare, or if the agency for good cause finds that observance of the requirements of notice and public hearing would be contrary to the public interest, the agency may dispense with such requirements and adopt the regulation or amendment as an emergency regulation or amendment. The agency's finding and a brief statement of the reasons for its finding shall be incorporated in the emergency regulation or amendment as filed under Section 5. An emergency regulation or amendment shall not remain in effect for longer than three months unless during that time the agency gives notice and holds a public hearing as required in this section.

C. No rule hereafter adopted is valid unless adopted in substantial compliance with this section.

D. The provisions of this section shall not apply to interpretive rules or general statements of policy.

Comment on Section 5

The recently enacted "State Rules Act"⁵⁵ has been incorporated into Section 5 of the proposed Administrative Procedure Act in an effort to employ as much existing New Mexico legislation as possible which is relevant and up-to-date. The State Rules Act governs the filing of agency rules, publications, pamphlets, reports, notices, proclamations and similar instruments⁵⁶ with the State Records Center, the librarian of the Supreme Court Law Library, and the

55. N.M. Stat. Ann. § 71-7-1 to -10 (Supp. 1967).

56. *Id.* §§ 3-5.

State Library.⁵⁷ It should be noted that, contrary to suggestions in the model acts, rules filed in accordance with the State Rules Act become valid and enforceable upon the date of filing.⁵⁸ Codification, in the form of a listing and indexing of rules by the state records administrator, is also provided for in the State Rules Act.⁵⁹

Section 5. [NEW MATERIAL] FILING OF RULES—WHEN EFFECTIVE.—A. Each agency shall file each rule adopted by it, including all rules existing on the effective date of the Administrative Procedure Act, according to the State Rules Act.

B. Each rule hereafter adopted is effective upon filing and compliance with other law.

Comments on Section 6

A provision requiring the publication of rules is included in the proposed Administrative Procedure Act in an effort to make all agency rules as available to the public as possible. The basic suggestions included in the Revised Model State Administrative Procedure Act have been followed.⁶⁰ The placement of the burden of publication upon the state records administrator is felt to be in conformity with other similar duties imposed upon him by the State Rules Act.⁶¹

Section 6C falls short of requiring a complete compilation system of the federal type, with a register and code of all regulations in which all regulations are centrally compiled, published and made available. Section 6C allows the state records administrator to omit from the compilation any rule which would be unduly cumbersome and expensive to publish. However, it requires that a notice which states the general nature of the omitted rule be carried in the central compilation, and that the omitted rule be made available at the adopting agency.

This section could be abused, and makes the register and code of regulations incomplete, but probably the expense involved is not justified by the amount of use of the compilation.⁶²

57. *Id.* § 3.

58. Although the RMSAPA provides for a twenty day period before a filed rule becomes effective, an immediate effective date clause has been inserted in the proposed Act in accordance with comparable existing legislation.

59. N.M. Stat. Ann. §§ 71-7-8 to -10 (Supp. 1967). Section 10 states, in part, that the "state records administrator shall prepare and publish a listing and index of all rules which are filed with it."

60. RMSAPA § 5.

61. N.M. Stat. Ann. §§ 71-7-7 to -10 (Supp. 1967).

62. F. Heady, *Administrative Procedure Legislation in the States* 33-40 (1952).

Section 6. [NEW MATERIAL] PUBLICATION OF RULES.—A. The state records administrator shall publish all effective rules adopted by each agency. Compilations shall be supplemented or revised as often as necessary and at least once every two years.

B. The state records administrator shall publish a bimonthly bulletin setting forth the text of all rules filed during the preceding months excluding rules in effect upon the adoption of the Administrative Procedure Act.

C. The state records administrator may omit from the bulletin or compilation any rule the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if the rule in printed or processed form is made available on application to the adopting agency, and if the bulletin or compilation contains a notice stating the general subject matter of the omitted rule and stating how a copy thereof may be obtained.

D. Bulletins and compilations shall be made available upon request to agencies and officials of New Mexico free of charge and to other persons at prices fixed by the state records administrator to cover mailing and publication costs.

Comments on Section 7

Section 7 allows interested individuals to petition for the promulgation, amendment or repeal of a rule and requires an agency to act upon such a petition within thirty days.⁶³

Section 7 also is directed at encouraging agencies to clarify the law they administer. One of the major failings of administrative agencies is their reluctance to clarify the law in advance so that interested parties may know what to expect from the agency.⁶⁴

Section 7. [NEW MATERIAL] PETITIONS FOR ADOPTION, PROMULGATION, AMENDMENT OR REPEAL OF RULES.—Any interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule, and may accompany his petition with such data, views and arguments as he

63. The following requirement, suggested in the RMSAPA, was felt to be unnecessary and was consequently deleted from proposed Section 7: "Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition." RMSAPA § 6.

64. Davis, *supra* note 39, at 583.

thinks pertinent. Within thirty days after the submission of a petition, the agency either shall deny the petition in writing stating its reasons for the denials or shall initiate rule-making proceedings in accordance with Section 3.

Comments on Section 8

Section 8 provides the mechanism for testing any rule-making action by the courts through a declaratory judgment. In the interest of orderliness and economy of effort it requires that the party exhaust his administrative remedies before taking the question to the courts. This is essential in order to make maximum use of the experience and thinking of the administrative agencies and in order to use efficiently the time and energies of the courts.

It should be noted that this section requires a finding that the rule threatens the rights or privileges of the plaintiff, indicating that only parties directly related to a particular hearing before the agency may employ this provision. All actions are to be heard by the court of the first judicial district due to the geographic location of most state agencies in Santa Fe.

Section 8. [NEW MATERIAL] JUDICIAL REVIEW BY DECLARATORY JUDGMENT.—The validity or applicability of a rule may be determined in an action for declaratory judgment in the court of the first judicial district if the court finds that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question. Review of final judgments of the district court shall be obtained from the Court of Appeals.

Comments on Section 9

Section 9 allows the statutory provisions, rules and orders of an agency to be tested for validity and applicability through the use of declaratory agency rulings. This form of preventive law allows an agency to decide questions in these particular areas and subjects such decisions to judicial review.⁶⁵ Needless litigation is prevented and all interested parties are advised of their status concerning a partic-

65. The legislation proposed differs from that suggested in the RMSAPA in that it clearly states that such decisions shall be subject to judicial review. See RMSAPA § 8.

ular statutory provision, rule or order at an early stage in the adjudicatory proceeding.

Section 9. [NEW MATERIAL] AGENCY DECLARATORY RULINGS.—Each agency shall by rule establish a system for declaratory rulings. Such rulings shall be issued upon petition by one whose legal rights or privileges are immediately at stake, except when the agency for good cause finds issuance of such a ruling undesirable. The agency shall prescribe in its rule the circumstances in which such rulings shall or shall not be issued. Declaratory rulings disposing of petitions have the same status as agency decisions or orders in adjudicatory proceedings and shall be subject to judicial review.

III

ADJUDICATION

The second half of the fundamental "rulemaking/adjudication dichotomy" involves the heart of administrative procedure. Fundamental concepts of justice and the nature of the "adjudicatory facts" which are the subject of the inquiry require a trial-type hearing. Basic fairness requires that each party have the opportunity to meet opposing evidence and argument with rebuttal evidence and argument, and to cross-examine opposing witnesses. Sections 10 through 17 provide the basic requirements for the trial-type hearing and the building of a record with an eye ultimately to judicial review. The authors have attempted to adopt suggestions of model acts and portions of existing sister-state legislation to New Mexico's past legislation⁶⁶ and current body of relevant judicial decisions.

In order to make clear the distinction between the argument-type hearing provided for rule-making and the trial-type hearing provided for adjudicatory proceedings, the proposed act specifically excludes rule-making hearings from the formalities of adjudicatory proceedings.

The definition of adjudicatory proceedings in Section 2B includes only those affecting "the legal rights, duties, or privileges of a party," but rate hearings, such as those for public carriers, have been included in the definition. Although rate hearings have features of rule-making, because of their broad prospective character we have

66. Of particular importance in this respect is the New Mexico Uniform Licensing Act, N.M. Stat. Ann. §§ 67-26-1 to -28 (Repl. 1961).

followed the model act and specifically included rate-making in adjudicative proceedings.

This reflects a belief on the part of the draftsmen of the Revised Model State Act that in proceedings before state public utility commissions leading to the establishment of rates for public utility companies, the interests of respondents and consumers alike are better served if it is required that there be made available the more complete opportunities for hearing that are required in case of adjudication.⁶⁷

Section 10 is one of the most important sections in the act. It answers a number of preliminary questions that often determine the scope of the inquiry, and whether the administrative procedure act will be relevant to the particular situation.

The content of notices and hearing records is covered by Section 10 of the proposed act. This section also allows for the informal disposition of cases covered by the act. A case can be informally disposed of through stipulation, settlement, consent order, or default. Also the parties may agree to limit the issues to be heard or even to vary the procedures required by the act. Most importantly, Section 10 establishes requirements for the conduct of adjudicatory proceedings. These requirements contain the minimum standards of fairness that all agencies must observe. For example, reasonable notice must be given to all parties so that they have sufficient opportunity to prepare. This notice must contain the time, place and nature of the hearing, the legal authority under which the agency is acting, and a brief statement of the matter asserted. If the issues cannot be fully stated in advance of the hearing, they must be fully stated as soon as practicable, and in the event of a delayed statement, additional time must be allowed in order to insure that the parties have a reasonable opportunity to prepare.

Section 10. [NEW MATERIAL] ADJUDICATORY PROCEEDINGS.—A. In conducting adjudicatory proceedings, as defined in this act, agencies shall afford all parties an opportunity for full and fair hearing. Unless otherwise provided by any law, agencies may:

67. Cooper, *supra* note 44 at 119-20.

(1) place on any party the responsibility of requesting a hearing if the agency notifies him in writing of his right to a hearing and of his responsibility to request the hearing;

(2) make informal disposition of any adjudicatory proceeding by stipulation, agreed settlement, consent order or default;

(3) limit the issues to be heard or vary the procedures prescribed by sub section B if the parties agree to such limitation or variation; and

(4) allow any person showing that he may be substantially and specifically affected by the proceeding to intervene as a party in the whole or any portion of the proceeding, and allow any other interested person to participate by presentation of argument orally or in writing, or for any other limited purpose as the agency may order.

When a party has the opportunity to obtain an agency hearing, followed by one or more appeals before the same agency or before different agencies, such appeals being limited to the record made at the hearing, the appeal procedure need not comply with any requirement for the conduct of adjudicatory proceedings except Section 12 and Section 13.

B. In adjudicatory proceedings, all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall include:

(1) a statement of the time, place and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved; and

(4) a short and plain statement of the matter asserted so that all shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare. If the issues cannot be fully stated in advance of the hearing, they shall be fully stated as soon as practicable. In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all parties reasonable opportunity to prepare.

C. Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy.

D. The agency shall make available an official record, which may be in narrative form, which shall include:

- (1) all pleadings, motions and intermediate rulings;
- (2) evidence received or considered;
- (3) questions and offers of proof, objections and rulings thereon;
- (4) proposed findings and exceptions; and
- (5) any decision, opinion or report by the officer presiding at the hearing; but the agency need not arrange to transcribe shorthand notes or sound recordings unless requested by a party. If so requested, the agency may, unless otherwise provided by any law, require the party to pay the reasonable costs of the transcript before the agency makes the transcript available to the party.

E. Findings of fact shall be based exclusively on the evidence presented and on matters officially noticed.

Comments on Section 11

The rules of evidence applicable to state agencies within the scope of an administrative procedure act must accomplish two primary tasks. They must provide general guidelines which will insure that a fair and complete hearing will be given to all interested parties and, at the same time, they must be flexible enough to be employed by all agencies. Section 11 allows all evidence of "probative value" to be admitted and requires all incompetent, irrelevant, immaterial and unduly repetitious evidence to be excluded. A "reasonably prudent man" standard is employed.⁶⁸ Because informality and efficiency are desirable in most administrative proceedings the proposed act follows the standard of the "prudent man" rather than the New Mexico judicial rules of evidence.⁶⁹

This standard of reliability allows the agency a good deal of flexibility in admitting and giving probative effect to evidence. This section is largely copied from the model act, and provides the same standard that is generally applied in practice by administrative agencies.

Section 11 also follows the example of the Massachusetts Act⁷⁰

68. For similar existing New Mexico legislation, see N.M. Stat. Ann. § 67-26-11 (Repl. 1961).

69. Although the RMSAPA suggests the use of "rules of evidence as applied in (non-jury) civil cases in the (District Courts of) the state, it is felt that such rules would severely limit the degree of informality desired in an administrative hearing.

70. Mass. Gen. Laws Ann. ch. 30A, § 11(4).

in requiring the agency to come forth with all its evidence, including any records, investigation reports, and documents, so that it may be made a part of the record. This is done to prevent the use of secret reports that are not made a part of the record and are, therefore, known to the parties. Basic fairness requires opportunity for the parties to be informed of the case against them so that they have a chance to prepare.

Section 11 also provides for cross-examination, the taking of notice by an agency, and the right of an interested party to counsel.⁷¹

Section 11. [NEW MATERIAL] PROCEDURES—EVIDENCE.—In adjudicatory proceedings:

(1) Evidence may be admitted and given probative effect if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs whether or not the evidence would be admissible by the courts. They shall give effect to the rules of privilege recognized by law. No greater exclusionary effect shall be given any such rule or privilege than would obtain in an action in court. Agencies shall exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;

(2) all evidence, including any records, investigation reports and documents in the possession of the agency of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record in the proceeding, and no other factual information or evidence shall be considered, except as provided in paragraph (4) of this section. Documentary evidence may be received in evidence in the form of copies or excerpts, or by incorporation by reference;

(3) every party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence;

(4) official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency, but whenever any officer or agency takes official

71. See N.M. Stat. Ann. § 67-26-8 (Repl. 1961) for similar legislation.

notice of a fact which may be disputable, the noticed fact and its source shall be stated at the earliest practicable time (before or during the hearing, in the proposal for decision referred to in Section 12, or in the final report), and any party shall on timely request be afforded an opportunity to show the contrary through a written submission of evidence or argument: Provided, however, that when an agency takes official notice of disputable facts in the process of preparing its final report, the agency shall in its discretion determine whether fairness requires that parties be afforded an opportunity to contest such facts before the decision is announced; and provided, further, that if a noticed fact is adjudicative, crucial and doubtful, any party adversely affected by the noticed fact shall have opportunity for cross-examination unless the agency in its discretion is satisfied that (1) the request for cross-examination is for purposes of delay, and that (2) cross-examination will in the circumstances serve no useful purpose.

Except as forbidden by Section 14, the experience, technical competence, and specialized knowledge of the agency and its staff may be utilized in the evaluation of the evidence; and

(5) any party shall at all times have the right to counsel, provided that such counsel is duly licensed to practice law in the State of New Mexico and is in good standing.

Comments on Section 12

An administrative procedure act must contain certain safeguards to insure that no agency decision adverse to interested parties is issued without a hearing before a majority of the officials rendering the decision. Section 12 provides that if a final decision is to be rendered by officials who have not heard the case or read the briefs, a proposed order must be issued to adversely affected parties. Section 12 then compels these officials to grant each party the opportunity and to present briefs and oral arguments. Although the immediate effect of this section could be to require an agency to conduct two hearings in a given case, the end result is to insure that those officials rendering the decision have heard from adversely affected parties either through oral arguments or written briefs.⁷²

Section 12. [NEW MATERIAL] PROPOSED DECISIONS.

—A. When in adjudicatory proceedings a majority of the officials

72. Note that provision has been made for the waiver of this requirement through written stipulation.

of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain proposed findings of fact and proposed conclusions of law; each conclusion of law shall be supported by authority or reasoned opinion.

Findings of fact shall be prepared by the officer presiding at the hearing, unless he becomes unavailable to the agency. If he is unavailable, the findings may be prepared by one who has read the record, unless demeanor of witnesses is a substantial factor. If demeanor is a substantial factor, and the presiding officer is unavailable, the portions of the hearing involving demeanor shall be held again or the case shall be dismissed.

Comments on Section 13

Final agency decisions and orders must be amenable to judicial review.⁷³ Section 13 insures this by requiring that written final orders or decisions include all findings of fact and conclusions of law. Some explanation of the basis for the agency decision or order, short of a complete recital of the entire body of evidence presented, is meant by the phrase "underlying facts supporting the findings."

Section 13. [NEW MATERIAL] CONTENTS OF DECISION.—A. A final decision or order adverse to a party in an adjudicatory proceeding shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. Each conclusion of law shall be supported by authority or by reasoned opinion. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the decision or order shall be

73. One of the most serious problems facing a party today in New Mexico, in appealing an agency decision to a state court, is the fact that in many situations, the record appealed upon discloses nothing more than the decision of the agency. See *McGee v. State ex rel. Reynolds*, 72 N.M. 48, 380 P. 2d 195 (1963).

delivered or mailed forthwith to each party and his attorney of record.

Comments on Section 14

Section 14 protects against the contamination of the judging process by forbidding those agency members who are acting in a prosecuting capacity from communicating off the record with those who are judging. It also provides for rules to prohibit any party or representative of a party from communicating off the record on a case with the agency. This again is directed at insuring that all parties have notice of actions relative to their case so that they may have opportunity to prepare.⁷⁴

Section 14. [NEW MATERIAL] EX PARTE CONSULTATIONS.—A. Agency members, presiding officers, and staff members may communicate with each other, except that no one participating in the decision in an adjudicatory proceeding shall consult with any member of the agency's staff engaged in investigating, prosecuting, or advocating in connection with the case under consideration or a factually related case. No staff member who is consulted about the decision in any adjudicatory proceeding shall be responsible to or subject to the supervision or direction of any officer engaged in investigating, prosecuting, or advocating, except that agency members may supervise all functions of their subordinates. Each agency shall issue rules which shall prohibit any party or representative of a party from communicating off the record about the case with any agency or staff member who participates in the decision of any adjudicatory proceeding unless a copy of the communication is sent to all parties to the proceeding. The agency's rules shall prohibit agency members and staff members participating in the decision of any adjudicatory proceeding from communicating off the record about the case with any party or representative of a party unless a copy of the communication is sent to all parties to the proceeding. The agency's rules may require the recipient of a prohibited communication to submit the communication if written or a summary of the communication if oral for inclusion in the record of the proceeding. As sanctions for violations, the rules may provide for decisions against parties who violate or whose representatives violate the rules; for censuring, suspending or revoking a privilege

74. Davis, *supra* note 39, at 587.

to practice before the agency; and for censuring, suspending, or dismissing any agency personnel.

Comments on Section 15

Although the New Mexico legislature has enacted a Uniform Licensing Act⁷⁵ applicable to specified state boards,⁷⁶ Section 15 has been included to insure that the proposed act applies to all license grants, denials or renewals by a state agency, whether governed by the Uniform Licensing Act or not. Licenses granted, denied or renewed under the current New Mexico Liquor Control Act,⁷⁷ for example, do not fall within the scope of the Uniform Licensing Act.⁷⁸

Section 15. [NEW MATERIAL] LICENSES.—A. Except as otherwise provided in this section, no agency shall revoke or refuse to renew any license unless it has first afforded the licensee an opportunity for hearing in conformity with Sections 10, 11, 12, 13, 14 and 16. If a licensee has, in accordance with any law and with agency regulations, made timely and sufficient application for a renewal, his license shall not expire until his application has been finally determined by the agency. Any agency that has authority to suspend a license without first holding a hearing shall promptly upon exercising such authority afford the licensee an opportunity for hearing in conformity with Sections 10, 11, 12, 13, 14 and 16.

Comments on Section 16

Section 16 grants state agencies, as well as parties appearing in a proceeding, the right to employ depositions and subpoenas.⁷⁹ The general rules of evidence presented in Section 11 are applied to the reception or exclusion of depositions into evidence in adjudicatory proceedings.⁸⁰

75. N.M. Stat. Ann. §§ 67-26-1 to -28 (Repl. 1961).

76. *Id.* § 2. Twenty four state boards are listed as being within the scope of the Uniform Licensing Act.

77. N.M. Stat. Ann. §§ 46-1-1 to -12-13 (Repl. 1966).

78. *Id.* §§ 46-6-1 to -9 govern complaints and hearings concerning the revocation and suspension of licenses.

79. No such provision is suggested in the RMSAPA. However, numerous other states make this type of provision in their Administrative Procedure Acts. For an example of comparable existing New Mexico legislation see N.M. Stat. Ann. § 67-26-9 (Repl. 1961).

80. Although some states apply general rules of evidence common to their state courts to depositions and subpoenas, no reason appears for doing so in the proposed Act.

The proposed act differs from the model act in that it gives any party the right to have a subpoena issued, either by the agency or a justice of the peace. This follows the Massachusetts Act,⁸¹ and was thought to be desirable in that it removes the control of subpoenas from the agency, which is often an adversary party.⁸²

To avoid harassment, the witness may petition the agency to vacate or modify a subpoena if the subpoena does not relate with reasonable directness to the matter in question, or if the attendance of a witness or the production of evidence would be unreasonable or oppressive. In addition, Section 16 attempts as much as possible to bring the administrative mechanics of subpoenas, such as payment of witnesses and the form of the subpoena, into conformity with civil court practice.

Section 16. [NEW MATERIAL] DEPOSITIONS—SUBPOENAS.—A. The agency conducting proceedings subject to the Administrative Procedure Act shall have power to require the furnishing of such information, the attendance of such witnesses, and the production of such books, records, papers or other objects as may be necessary and proper for the purposes of the proceeding. The agency, or any party to a proceeding before it, may take the depositions of witnesses, within or without the State, in the same manner as is provided by law for the taking of depositions in civil actions in courts of record. Depositions so taken shall be admissible in any proceeding affected by this Act: Provided, however, that all or any part of the deposition may be objected to at the time of hearing, and may be received in evidence or excluded from the evidence by the individual conducting the hearing, in accordance with the rules of evidence made applicable to the hearing by Section 11.

B. In furtherance of the powers granted by sub section (A) hereof, agencies shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence or documents, relating to any matter in question in the proceeding. Agencies may administer oaths and affirmations, examine witnesses, and receive evidence. The power to issue subpoenas may be exercised by

81. Mass. Gen. Laws Ann. ch. 30A, § 12.

82. Curran & Sacks, *supra* note 34, at 92.

any member of the agency or by any person or persons designated by the agency for such purpose.

C. The agency may prescribe the form of subpoena, but it shall adhere, in so far as practicable, to the form used in civil cases before the courts, unless another manner is provided by any law. Witnesses summoned shall be paid the same fees for attendance and travel as in civil cases before the courts, unless otherwise provided by any law.

D. Any party to an adjudicatory or rule-making proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. The party may have such subpoenas issued by a justice of the peace, or he may make written application to the agency, which shall forthwith issue the subpoenas requested. However issued, the subpoena shall show on its face the name and address of the party at whose request the subpoena was issued. Unless otherwise provided by any law, the agency need not pay fees for attendance and travel to witnesses summoned by a party.

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

F. In case of disobedience to any subpoena issued and served under this section or to any lawful agency requirement for information, or of the refusal of any person to testify to any matter regarding which he may be interrogated lawfully in a proceeding before an agency, the agency may apply to the district court in the county of such person's residence or to any judge thereof for an order to compel compliance with the subpoena or the furnishing of information or the giving of testimony. Forthwith the court or judge shall cite the respondent to appear and shall hear the matter as expeditiously as possible. If the disobedience or refusal is found to be unlawful, the court or judge shall enter an order requiring compliance. Disobedience of such an order shall be punished as contempt

of court in the same manner and by the same procedure as is provided for like conduct committed in the course of judicial proceedings.

Comments on Section 17

Disqualification of a hearing examiner or agency member is provided for in Section 17. The proposed basis for disqualification is the individual's inability to give a fair and impartial hearing to the particular parties involved.

Section 17. [NEW MATERIAL] DISQUALIFICATION.—A hearing examiner or agency member shall withdraw from any individual proceeding in which he cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of a hearing examiner or agency member, on the ground of his inability to give a fair and impartial hearing, by filing an affidavit, promptly upon the discovery of the alleged disqualification, stating with articulability the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue shall be determined promptly by the agency, or, if it affects a member or members of the agency, by the remaining members thereof, if a quorum. Upon the entry of an order of disqualification affecting a hearing examiner, the agency shall assign another in his stead or shall conduct the hearing itself. Upon the disqualification of a member of an agency, the Governor immediately shall appoint a member *pro tem* to sit in place of the disqualified member in that proceeding.

IV

JUDICIAL REVIEW

Judicial review stands as the ultimate assurance of due process afforded to any party to an adjudicatory proceeding. In the proposed act, judicial review is made available to any party adversely affected by a final agency decision or order.

Sections 3 through 17 of the proposed act, those dealing with rule-making and adjudicatory proceedings, were primarily concerned with establishing minimum standards of fairness. Uniformity was a secondary but valuable result. In the area of judicial review, uniformity is the primary goal. Accordingly, in resolving the issue of how much the proposed act should replace existing law, we have opted in favor of uniformity. Thus, the proposed act not only

governs where there is no statutory form of review, but also supercedes existing statutory forms of review. It is certainly arguable that good reason exists for different judicial review procedures because of differences from agency to agency, but in the interest of uniformity, particularly considering the viewpoint of the public and the practicing bar, it is our judgment that a comprehensive form of judicial review for all agencies is the best approach. We have, however, made the system flexible by providing that other review procedures can subsequently be provided by the legislature if it decides that special circumstances warrant special review procedures for a particular agency.⁸³

In the interest of orderly procedures and efficiency, parties are required by Section 18 to exhaust their administrative remedies before resorting to judicial review, but in order to avoid inequities and hardship, provision is made for judicial review even of preliminary procedural or intermediate actions of the agency if a delay of judicial review until after the final agency decision would not provide an adequate remedy.

Section 22 allows the presentation of additional evidence to the court on review if the court is satisfied that the additional evidence is relevant, and that there was good reason for its failure to be presented before the agency proceedings.

Beyond that, Sections 18 through 23 set out the detailed procedures for review, the costs of preparing the record, intervention in the review proceedings, and the provisions for a stay of enforcement of agency decisions.

Uniformity in procedure will be a great help to lawyers practicing before the agencies. It will help them represent their clients with greater certainty and efficiency. Lawyers who deal with only one agency can, of course, familiarize themselves with the procedures of that agency, but in New Mexico most lawyers deal with more than one agency. Therefore, uniformity in procedures for all agencies should be a substantial step forward for them.

Section 18. [NEW MATERIAL] PETITION FOR JUDICIAL REVIEW.—A. Any party who has exhausted all administrative remedies available within the agency and who is adversely affected by a final order or decision in an adjudicatory proceeding, whether such order or decision is affirmative or negative in form, is

83. § 18 (A) & (B).

entitled to certain, speedy, adequate and complete judicial review thereof under the Administrative Procedure Act, but nothing in this section shall prevent resort to other means of review, redress, or relief, available because of constitutional provisions or otherwise prescribed by law. A preliminary procedural or intermediate action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

B. In all instances, unless otherwise provided by law, proceedings for review under the Administrative Procedure Act shall be instituted by filing a petition in the Court of Appeals of New Mexico within thirty days after the appellant has been notified of the final agency order or decision.

The petition shall be addressed to the court and shall include a concise statement of the facts upon which jurisdiction and venue are based, facts showing that petitioner is aggrieved, and the ground or grounds specified in Section 24 upon which petitioner contends he is entitled to relief. The petition shall demand the relief to which petitioner believes he is entitled, which demand may be in the alternative. Copies of the petition shall be served, personally or by registered mail, not later than ten days after the institution of the proceeding upon all parties to the agency proceeding in which the decision sought to be reviewed was made. For the purpose of such service the agency upon request shall certify to the petitioner the names and addresses of all such parties as disclosed by its records, and service upon parties so certified shall be sufficient, and proof of such service shall be filed in the court within ten days after the filing of the petition. All parties to the proceeding before the agency shall have the right to intervene in the proceeding for review. The court may in its discretion permit other interested persons to intervene.

Section 19. [NEW MATERIAL] STAY OF ENFORCEMENT OF AGENCY DECISION.—The filing of a petition for review does not itself stay enforcement of the agency decision; but the agency may grant, or the reviewing court may order, a stay upon appropriate terms as is deemed necessary.

Section 20. [NEW MATERIAL] RECORD OF PROCEEDING.—Within thirty days after the service of the petition or within such further time as the court may allow, the agency shall file in the court the original or a certified copy of the record of the proceed-

ings under review. The record shall consist of (a) the entire proceedings, or (b) such portions thereof as the agency and the parties may stipulate, or (c) a statement of the case agreed to by the agency and the parties. The expense of preparing the record may be assessed as part of the costs in the case, and the court may, regardless of the outcome of the case, assess anyone unreasonably refusing to stipulate to limit the record, for the additional expenses of preparation caused by such refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

Section 21. [NEW MATERIAL] INTERVENTION.— Any person served with a copy of the petition for review as provided in Section 18(B), and who desires to intervene in the review proceeding, shall, within ten days after service of the copy of the petition upon such person, serve upon petitioner and the agency, and file in the court, a notice of intervention stating his interest and the position he takes with respect to the agency decision under review. Service of all subsequent papers or notices in the review proceeding need be made only upon the agency and the parties, who shall include the petitioner, those persons who have filed notices of intervention, and any other persons who have been permitted to intervene by the court.

Section 22. [NEW MATERIAL] ADDITIONAL EVIDENCE.—If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material to the issues in the case, and that there was good reason for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of such additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modified or new findings or decision.

Section 23. [NEW MATERIAL] CONDUCT OF REVIEW PROCEEDINGS.—The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not

shown in the record, testimony thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

Comments on Section 24

Section 24 establishes uniform standards for judicial review of adjudicatory proceedings. Lower level decisions may be modified, set aside or revised and remanded for any one of six specified reasons.⁸⁴ New Mexico's substantial evidence rule has been included in subsection (5) of this section.⁸⁵

Thus, the proposed act establishes in a single statute a unitary body of standards governing the judicial review of administrative action. This development of a unitary body of law should be of considerable assistance, both to the courts and the Bar.

The act also follows the federal example in requiring that determinations by the courts on judicial review shall be based upon the entire record, or at least fixed portions of the record as decided by the parties.⁸⁶

These standards for review are stated in general terms, and their further elaboration and definition will be left to the courts. Again, the essential aim is to achieve uniformity so that the courts may proceed expeditiously to develop a unitary body of law governing judicial review of administrative actions. Thus, confusion can be minimized, and consistency maximized.

Section 24. [NEW MATERIAL] SCOPE OF REVIEW.—

A. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. In any proceeding for review of an agency decision or order, the court may set aside the order or decision, or reverse it and remand it to the

84. Similar language has been employed by the New Mexico Supreme Court over the years in such cases as *State v. Mountain States Tel. & Tel. Co.*, 54 N.M. 315, 224 P.2d 155 (1950); *McCormick v. Board of Education*, 58 N.M. 648, 660, 274 P.2d 299 (1955); *Ferguson-Steere Motor Co. v. State Corporation Comm'n*, 63 N.M. 137, 314 P.2d 894 (1957); *Bennett v. State Corporation Comm'n*, 73 N.M. 126, 385 P.2d 978 (1963). It should also be noted that the proposed section differs from the suggestions of the RMSAPA in that it requires a reviewing court to affirm an agency decision found to be free from prejudicial error to the appellant.

85. See *Kelley v. Carlsbad Irrigation District*, 71 N.M. 464, 379 P.2d 763 (1963); *Continental Oil Co. v. Oil Conservation Commission*, *supra* note 12.

86. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 Sup. Ct. 456, 95 L.Ed. 456 (1951). Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 Harv. L. Rev. 1233 (1951).

agency for further proceedings, if it determines that the substantial rights of the appellant or petitioner for review have been prejudiced because the agency findings, inferences, conclusions or decisions are:

- (1) in violation of constitutional provisions; or
- (2) in excess of the statutory authority or jurisdiction of the agency; or
- (3) made upon unlawful procedure; or
- (4) affected by other error of law; or
- (5) unsupported by substantial evidence; or
- (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The court shall make the foregoing determinations upon consideration of the entire record, or such portions of the record as may be cited by the parties. The court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.

B. The reviewing court may remand the case to the agency for the taking and consideration of further evidence, if it is deemed essential to a proper disposition of the issue.

C. The reviewing court shall affirm the order or decision of the agency, if it is found to be valid and the proceedings are free from prejudicial error to the appellant.

Section 25. [NEW MATERIAL] AMENDING AND REPEALING.—The provisions of the Administrative Procedure Act may be amended, repealed, suspended, or superceded by another act of the legislature only by direct reference to the section or sections of this Act being amended, repealed, or superceded.

Section 26. [NEW MATERIAL] PURPOSE OF ACT—LIBERAL INTERPRETATION.—The legislature expressly declares:

Its purpose in enacting the Administrative Procedure Act is to promote uniformity with respect to administrative procedures and judicial review of administrative decisions and that the Administrative Procedure Act is to be liberally construed to carry out its purpose.

Section 27. [NEW MATERIAL] SEVERABILITY—If any part or application of this act is held invalid, the remainder of this act or its application to other situations or persons, shall not be affected.