

**REPORT OF THE JUDICIAL COUNCIL  
ADMINISTRATIVE PROCEDURE ADVISORY COMMITTEE**

**APPROVED BY THE JUDICIAL COUNCIL ON  
DECEMBER 9, 2008**

**BACKGROUND**

In June 2006, the Judicial Council's Administrative Procedure Advisory Committee requested that the Council assign it the task of studying the Kansas Administrative Procedure Act (KAPA), K.S.A. 77-501 *et seq.*, and the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77-601 *et seq.* Both Acts were originally passed in 1984 and had not been significantly amended since that time. Advisory Committee members were aware of several areas in which the Acts could be improved and believed that a comprehensive review of both Acts was needed. The Judicial Council agreed and made the requested assignment.

**COMMITTEE MEMBERSHIP**

The members of the Administrative Procedure Advisory Committee taking part in this study were:

Carol L. Foreman, Chair, Topeka; Deputy Secretary of the Department of Administration  
Tracy T. Diel, Topeka; Director of the Office of Administrative Hearings  
James G. Flaherty, Ottawa; practicing attorney  
Jack Glaves, Wichita; practicing attorney  
Hon. Steve Leben, Topeka; Kansas Court of Appeals Judge  
Prof. Richard E. Levy, Lawrence; Professor at the University of Kansas School of Law  
Brian J. Moline, Topeka; practicing attorney and former member of the Kansas  
Corporation Commission  
Camille A. Nohe, Topeka; Assistant Attorney General  
Hon. Eric Rosen, Topeka; Kansas Supreme Court Justice  
Steve A. Schwarm, Topeka; practicing attorney  
John S. Seeber, Wichita; practicing attorney  
Mark W. Stafford, Topeka; practicing attorney

**METHOD OF STUDY**

In conducting its study of KAPA and KJRA, the Administrative Procedure Advisory Committee held 24 meetings over two and a half years. The Committee solicited and considered input from a variety of sources, including state agencies, agency legal counsel, and other attorneys practicing in the area of administrative law. The Committee also met with two students in the University of Kansas Law School's Public Policy Clinic who prepared a research paper addressing specific administrative law issues suggested by the Committee.

As it reviewed each Act, the Committee considered the case law interpreting each section. Because the original versions of KAPA and KJRA were based, at least in part, on the 1981 Model State Administrative Procedure Act, the Committee also considered a revised version of the Model Act currently under consideration by the Uniform Law Commissioners.<sup>1</sup> When proposing amendments to KAPA and KJRA, the Committee adapted language from the revised Model Act if the Act's language was consistent with the Committee's resolution of an issue, because the Model Act's language has been carefully vetted and because using that language would promote consistency with other states.

During the period in which the Committee was studying the KAPA and KJRA, various bills were introduced in the Kansas Legislature proposing amendments to those statutes. Responding to legislative requests, the Committee provided testimony or commented on several of these bills, and in several instances suggested specific language that was the product of the Committee's ongoing discussions. This report represents the culmination of the Committee's comprehensive review of both statutes, although it incorporates a number of recommendations or comments already submitted to the legislature. It also includes a recommendation against adoption of an amendment included last session in Sub. HB 2618 that would limit the ability of the agency itself to preside over KAPA hearings.

## **COMMITTEE RECOMMENDATIONS**

The Committee proposes the adoption of a number of amendments to KAPA and KJRA, which are reflected in the "redline" version of those statutes appended to this report. The redline version includes comments discussing the reasons for particular amendments, many of which are technical or intended for purposes of clarification. This report will not discuss technical or clarifying amendments, but rather will focus on the Committee's most important recommendations concerning agency adjudication and judicial review. Most of these recommendations address the same concerns that prompted legislative attention to KAPA and KJRA over the last few years: Whether the agency's role in investigating and prosecuting violations of the laws it administers is compatible with its acting as a fair and impartial adjudicator. States respond to this issue in a variety of ways, ranging from giving agencies complete control over adjudication to making hearing officers independent and precluding agency review.<sup>2</sup> Currently, Kansas law provides agencies with very strong tools to control adjudication and offers relatively few protections to ensure fair and impartial agency adjudications. Many of the Committee's recommendations are intended to significantly strengthen the protections for fair and impartial adjudication without unduly sacrificing agency expertise or interfering with agency policymaking responsibilities.

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<sup>1</sup> National Conference of Commissioners on Uniform State Laws, Revised Model State Administrative Procedure Act (Draft), available on line at [http://www.law.upenn.edu/bll/archives/ulc/msapa/2008\\_amdraft.htm](http://www.law.upenn.edu/bll/archives/ulc/msapa/2008_amdraft.htm).

<sup>2</sup> Two fairly recent articles by the same author provide a useful compendium and summary of state approaches to these issues. See James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final Order Authority*, 38 Ind. L. Rev. 401 (2005); James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 Admin. L. Rev. 1355, 1382-85 (2002).

The Committee recommendations, which concern both the conduct of hearings under KAPA and the effectiveness of judicial review under KJRA, can be summarized as follows:

1. The burden of proof for adverse actions involving an individual's occupational and professional licenses should be "clear and convincing evidence." (Proposed Amendment to K.S.A. 77-512)
2. The separation of agency adjudicators from personnel involved in investigations and prosecutions should be strengthened. (Proposed Amendments to K.S.A. 77-514 and 77-525)
3. When agency heads review decisions by hearing officers in the Office of Administrative Hearings, they should be required to give "due regard" to the hearing officer's opportunity to observe witnesses. (Proposed Amendment to K.S.A. 77-527)
4. Unnecessary technical barriers to judicial review of agency action should be removed. (Proposed Amendments to K.S.A. 77-612, 77-614, and 77-617)
5. KJRA should emphasize the obligation of courts reviewing an agency's factual findings to consider the whole record (including adverse evidence and a contrary hearing officer decision). (Proposed Amendment to K.S.A. 77-621) **Note:** This change would not adopt the de novo review standard or permit courts to reweigh the evidence, but rather would restore the original intent of KJRA that reviewing courts should consider the substantiality of the evidence supporting the agency decision in light of the entire record.
6. Agency heads should retain the power to conduct administrative hearings and to decide whether a specific case should be heard by the agency head.
7. Additional amendments should be adopted to clarify the computation of time (proposed amendments to K.S.A. 77-503 and scattered additional provisions) and to provide greater protection for confidential information (proposed new section K.S.A. 77-503a; proposed amendments to K.S.A. 45-221 and K.S.A. 77-523).

**A. Recommended Amendments to KAPA:** The first three recommendations involve amendments to KAPA to provide greater protections to parties in the conduct of KAPA hearings.

1. The burden of proof for adverse actions involving an individual's occupational and professional licenses should be "clear and convincing evidence." (Proposed Amendment to K.S.A. 77-512)

The advisory committee recommends raising the burden of proof to “clear and convincing evidence” for disciplinary actions concerning occupational and professional licenses in order to provide greater protection for these especially important interests. Occupational and professional licenses represent a substantial investment of time, energy, and resources and are a prerequisite to the individual’s pursuit of a chosen calling. These concerns have caused some courts to hold that due process requires the application of the clear and convincing standard of proof to the revocation of professional licenses, although these decisions appear to represent the minority view and the Kansas Supreme Court does not appear to have resolved the issue.<sup>3</sup> This higher standard of proof already applies by virtue of Supreme Court Rule in attorney disciplinary proceedings and may apply to other licenses as well.<sup>4</sup> The Committee believes that the law in Kansas regarding the appropriate standard of proof should be clarified and that strong evidence of incompetence or misconduct should be presented before disciplinary action is taken against such licenses. At the same time, the advisory committee believes that similar concerns do not apply to initial applications for licenses or to other kinds of licenses that fall under the broad definition in the Kansas Administrative Procedure Act.

2. The separation of agency adjudicators from personnel involved in investigations or prosecutions should be strengthened. (Proposed Amendments to K.S.A. 77-514 and 77-525)

The most troubling situation from a fundamental fairness perspective is when agency personnel who act in an investigatory, prosecutorial or adversarial capacity on a case are also involved in the adjudication of that case. Currently, K.S.A. 77-514, which governs the presiding officer in hearings, does not contain any separation of functions requirement and K.S.A. 77-525, which prohibits ex parte communications, would not appear to apply to communications between the agency head serving as presiding officer and agency personnel who had investigatory or prosecutorial roles. Although judicial decisions in Kansas require separation of functions,<sup>5</sup> the advisory committee recommends the addition of a separation of functions requirement to K.S.A. 77-514 to provide more specific guidance. To reinforce this separation, the Committee recommends that the prohibition on ex parte communications under KAPA should be expanded to bar communications between presiding officers and investigatory or prosecutorial personnel regarding pending cases.

3. When agency heads review decisions by hearing officers in the Office of Administrative Hearings, they should be required to give “due regard” to the hearing officer’s opportunity to observe witnesses. (Proposed Amendment to K.S.A. 77-527)

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<sup>3</sup> See, e.g., *Johnson v. Board of Governors of Registered Dentists*, 913 P.2d 1339, 1345-47 (Okla.1996); *Nguyen v. State*, 144 Wash.2d 516, 29 P.3d 689, 690-97 (2001); *Painter v. Abels*, 998 P.2d 931, 941-42 (Wyo.2000). *But see* *Eaves v. Board of Med. Exam'rs*, 467 N.W.2d 234, 237 (Iowa 1991); *Rucker v. Michigan Bd. of Med.*, 138 Mich.App. 209, 360 N.W.2d 154, 155 (1984); *Petition of Grimm*, 138 N.H. 42, 635 A.2d 456, 461 (1993); *In re Polk*, 90 N.J. 550, 449 A.2d 7, 12-17 (1982); *Anonymous v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 496 S.E.2d 17, 19-20 (1998); *Gandhi v. Medical Examining Bd.*, 168 Wis.2d 299, 483 N.W.2d 295, 298-300 (Ct.App.1992).

<sup>4</sup> See *Lacy v. Kansas Dental Bd.*, 274 Kan. 1031, 1036 58 P.3d 668, 673 (2002) (application of clear and convincing evidence standard in case involving dentist’s license).

<sup>5</sup> E.g., *Pork Motel, Corp v. Kansas Department of Health and Environment*, 234 Kan. 374, 383 (1983).

Under current law, agencies review decisions of hearing officers in the Office of Administrative hearings “de novo”; *i.e.*, without any deference to the hearing officer decision. While such de novo review power is critical to the agency’s policy making function and to the application of its expertise (which hearing officers lack), concerns may arise because the hearing officer rather than the agency has the opportunity to observe the witnesses and because this standard appears to give the agency authority to disregard the findings of fact made by the independent hearing officer. The advisory committee believes that the draft Revised Model State Administrative Procedure Act,<sup>6</sup> which requires the agency to have “due regard” for the hearing officer’s obligation to view witnesses takes a reasonable approach and its proposed amendment to K.S.A. 77-527 reflects this approach. Under this standard, the agency would, in effect, be required to explain why it is rejecting the credibility determinations of the hearing officer. This requirement in turn interacts with the Committee’s proposals to strengthen judicial review, discussed below.

**B. Recommended Amendments to KJRA:** Recommendations 4 and 5 involve amendments to KJRA designed to make judicial review more available and meaningful as a check on the fairness of agency decisions without interfering with the agencies’ expertise and legitimate policy making functions.

4. Unnecessary technical barriers to judicial review of agency action should be removed. (Proposed Amendments to K.S.A. 77-612, 77-614, and 77-617)

During its review of KJRA, the Committee received comments expressing concern that pleading and exhaustion requirements in KJRA were being applied to dismiss or reject challenges to agency action for technical reasons unrelated to the merits of the challenge. The Committee believed that some of these technical barriers were unreasonable and unnecessary. First, with regard to the initiation of actions for judicial review, K.S.A. 77-614 contains a number of very specific pleading requirements that are not required in ordinary civil actions. While more detailed information is necessary and helpful in conducting the action for judicial review, many courts have interpreted these requirements as jurisdictional, applied them very strictly, and refused to allow amendments to correct minor errors. This strict application is not necessary to the effective conduct of judicial review and deprives many parties of their day in court. Thus, the Committee recommends amendments to clarify that the pleading requirements are not jurisdictional in the sense that pleadings can be amended to correct mistakes if doing so will not cause prejudice. Second, the Committee also recommends language to clarify an exception to exhaustion requirements in K.S.A. 77-612 when administrative remedies are inadequate or when exhausting administrative remedies would cause irreparable harm. These exceptions have been recognized in some court cases in Kansas, and the committee believes that they should be defined by statute. Similarly, the Committee also recommends expanding an exception in K.S.A. 77-617 to allow parties to raise issues on review that were not presented to the agency if those issues were not reasonably knowable during the administrative process.

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<sup>6</sup> Revised Model State Administrative Procedure Act § 418(e).

5. KJRA should be amended to emphasize the obligation of courts reviewing an agency's factual findings to consider the whole record (including adverse evidence and a contrary hearing officer decision).

Under the Kansas Supreme Court's approach to the "substantial evidence" standard of review, courts should consider only the evidence in the record that favors the agency decision, and disregard contrary evidence.<sup>7</sup> The Committee believes that this approach accords excessive deference to the agency and erects a nearly insurmountable barrier for parties challenging agency action. It is particularly problematic when the agency reverses the decision of a hearing officer, because it treats the hearing officer's decision as essentially irrelevant. The Kansas approach is a significant departure from the usual understanding (at the federal level and in other states) of the requirement that an agency decision be supported by substantial evidence *in light of the record as a whole*, which includes consideration of the contrary evidence in the record and specifically treats a hearing officer's decision as part of that record. The Committee believes that amending K.S.A. 77-621 to ensure that on judicial review the court will consider contrary evidence in the record, including the hearing officer's contrary decision, would reinforce the importance of the neutral hearing officer's factual findings—particularly credibility determinations based on the opportunity to view the witnesses—without impairing the agency's legitimate policy making functions. This change would work together with the Committee's recommendation that the agencies should be required to give due regard to the hearing officer's ability to observe witnesses. More broadly, it would require agencies to explain more fully their reasons for rejecting contrary evidence in the record. This change would not adopt the de novo review standard or permit courts to reweigh the evidence, but rather restore the original intent of KJRA that reviewing courts should consider the substantiality of the evidence supporting the agency decision in light of the entire record.)

The language of the Committee's proposed amendment is adapted from one of two alternative versions of the scope of review standards in the Revised Model State Administrative Procedure Act.<sup>8</sup> The other alternative version is consistent with the current version of the KJRA in Kansas and the Committee considered additional language clarifying the reviewing court's obligation to consider all the evidence in the record to be necessary. After hearing concerns from some agencies that the Committee's proposed language would adopt the de novo standard of review, which was never the Committee's intention, the Committee added additional language to specify that de novo review does not apply. That language is not adapted from the Revised Model Act.

**C. Additional Recommendations:** Recommendations 6 and 7 address additional issues.

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<sup>7</sup> See, e.g., *Blue Cross and Blue Shield of Kansas v. Praeger*, 276 Kan. 232, 263, 75 P.3d 226, 246 (2003) (“[T]he courts are not concerned with evidence contrary to the agency findings but must focus solely on evidence in support of the findings.”); *Kaufman v. State Department of Social and Rehabilitation Services*, 248 Kan. 951, 962, 811 P.2d 876, 884 (1991); *In re Andover Antique Mall, L.L.C.*, 33 Kan. App. 3d 199, 207-08, 99 P.3d 1117, 1124 (Kan. Ct. App. 2004). See generally, Steve Leben, *Challenging and Defending Agency Actions in Kansas*, 64 *Kansas Bar Association Journal* 22, 27-29 (June/July 1995).

<sup>8</sup> Revised Model State Administrative Procedure Act § 509 (Alternative 2).

6. Agency heads should retain the power to conduct administrative hearings and to decide whether a specific case should be heard by the agency head.

During the 2008 legislative session, the House Judiciary Committee included an amendment in Sub. HB 2618 to limit the authority of agency heads (except BOTA and the KCC) to conduct hearings. The Committee believes that agency heads should retain the option to hear cases that the agency considers to present important policy issues or to require agency expertise for resolution. While Sub. HB 2618 did contain a provision allowing OAH hearing officers to certify policy questions to the agency, the Committee believes that the decision whether a case involves important policy issues is a question that should be decided by the agency, not by the presiding officer. Furthermore, even when policy issues are not involved, agency expertise may be essential to the evaluation of evidence in a case.

7. Additional amendments should be adopted to clarify the computation of time (proposed amendments to K.S.A. 77-503 and scattered additional provisions) and to provide greater protection for confidential information (proposed new section K.S.A. 77-503a; proposed amendments to K.S.A. 45-221 and K.S.A. 77-523).

Two additional aspects of the Committee's proposals warrant mention, even though they are not related to the central issue of strengthening the protections for fair and impartial adjudication without unduly sacrificing agency expertise or interfering with agency policymaking responsibilities. First, the Committee proposes new language in K.S.A. 77-503 to clarify the computation of time and make that computation workable for the time limits incorporated in KAPA. The Committee has also proposed conforming amendments to some other provisions in KAPA that set time limits. These changes are not intended to significantly alter the existing time limits, but rather to address particular issues that arise because of the very short time limits associated with some actions under KAPA. Second, the Committee proposes a new section of KAPA (77-503a) that would permit presiding officers to keep the personal information regarding victims of crimes out of the public record to protect their health, safety, and liberty. The Committee has included a similar amendment for the Kansas Open Records Act, which would add such information to the exceptions to Act in K.S.A. 45-221. In addition, the Committee proposes an amendment to K.S.A. 77-523 that would authorize a hearing officer to close a KAPA hearing when information required by law to be kept confidential would otherwise be disclosed.