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The Colorado Administrative Procedure Act: Exclusions Demanding Reform

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THE COLORADO ADMINISTRATIVE PROCEDURE ACT: EXCLUSIONS DEMANDING REFORM

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Mr. Henry demonstrates his expertise in the area of administrative law in Colorado as he urges reform in the State Administrative Procedure Act. After discussing the development of the APA, the author points out its shortcomings by examples of agencies which are not governed by the act. The lack of uniformity and multifarious procedural differences among administrative agencies warrant consideration of the reforms posed by the revised State Administrative Procedure Act which The Colorado Legislature failed to enact in 1963. He then discusses how the revised act would resolve many of the problems not covered by the present act. Moreover he recommends that all agency material which is required by law to be published be compiled in a state register. Presently, this material may be published separately by each agency. Mr. Henry urges that the revised act be reconsidered by the legislature as soon as possible to attain procedural uniformity in administrative agencies.

INTRODUCTION

THE State Administrative Procedure Act of Colorado (APA) was born of necessity — or at least expediency verging on necessity. A uniform and explicit statement of the law regulating procedures of Colorado's many administrative agencies was sought by the proponents of the act. At the time of the statute's drafting in 1959, there was an increasing demand for the creation of new state agencies and for the revision of acts governing existing agencies.[1] Proponents of such legislation urged that it include greater detail concerning procedure and review. It was evident, however, that the inclusion of such details in the acts regulating individual agencies would undesirably increase the bulk of the statutes. But experience under the Federal Administrative Procedure Act had shown that many of these details could be incorporated into a single statute relating to a large number of agencies; statutes pertaining to individual agencies could thereby be shortened, and the desired uniformity achieved.

The Administrative Law Committee of the Colorado Bar Association undertook the task of writing such a statute. Its proposed

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[1] Henry, *Bar Briefs The 1959 Session of the Colorado General Assembly*, 36 DICTA, 257, 264 (1959).

bill was presented to the Colorado General Assembly and enacted into law in 1959.[2] It was amended slightly in 1961[3] at the suggestion of the Administrative Law Committee of the Colorado Bar Association, and is now Article 16, of Chapter 3, of the Colorado Revised Statutes of 1963. The act is generally referred to as the State Administrative Procedure Act, although it is not officially designated as such by the statute.

The basic guide used by the Colorado Bar Committee in drafting this act was the 1957 final draft of the proposed federal code of administrative procedure.[4] Since its adoption in 1946,[5] the Federal Administrative Procedure Act has never been substantially amended. However, during the years subsequent to the adoption of the federal act, committees of the American Bar Association have attempted unsuccessfully to secure a major revision that would incorporate clarifications found desirable after actual experience under that act; the 1957 proposed code was the fruit of one committee's efforts.

The drafters also referred to the revised Model State Administrative Procedure Act to assist them in preparing the Colorado Statute. The Model Act was first adopted by the National Conference of Commissioners on Uniform State Laws in 1946; it was meant to parallel the federal act, but for state administrative procedure. The initial draft underwent a subsequent period of revision which culminated in the revised Model Act of 1961.[6]

The drafters of the federal act and the model state act began with the same basic propositions and ideas in mind. Although development of the acts by separate committees caused some variation in language and arrangement, their major provisions remained substantially the same. The Colorado Bar Committee drew from both acts the provisions that it felt would be desirable in administrative practice in Colorado, rejecting only those which seemed inappropriate to specific attitudes and practices which had developed through the years in the state's administrative procedure. As a result, the APA varies in language and to some extent in arrangement of content from the federal and revised model state act, but does not vary significantly in substance.

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[2] COLO. REV. STAT. §§ 3-16-1 to -6 (1963).

[3] Colo. Sess. Laws 1961, ch. 44, at 138.

[4] The American Bar Association Code was introduced as S. 2335, 88th Cong., 2d Sess. (1964), and the Senate watered it down to S. 1663, 88th Cong., 2d Sess. (1964). See generally 1 DAVIS ADMINISTRATIVE LAW TREATISE § 1.04 (Supp. 1966).

[5] 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1952).

[6] Reprinted and criticised in DAVIS, ADMINISTRATIVE LAW, Cases—Text—PROBLEMS 575 (1965). Also criticised in 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 1.04 (Supp. 1966).

In spite of the lack of substantial amendment to the Colorado act since its enactment in 1959, the present law has not been completely satisfactory. In 1963 the Administrative Law Committee of the Colorado Bar Association presented to the General Assembly a complete revision of the law.[7] However, because of an amendment to the bill in the House of Representatives which apparently would have permitted non-lawyers to represent others[8] before administrative agencies, the Colorado Bar Association withdrew its support of the bill, and it died in the Senate.[9]

The APA does not achieve the commendable goal of uniformity sought by its proponents. One of its greatest inadequacies is the following provision: "Where a specific statutory provision applies to a specific agency, such specific statutory provision shall control as to such agency."[10] This clause has left many areas of procedure where the APA is consequently inapplicable. By discussing the scope of this law and other statutory provisions applicable to agencies, major areas of conflict are discernable. At that point recommended reforms to rectify these conflicts can be discussed.

I. THE PRESENT STATE ADMINISTRATIVE PROCEDURE ACT

The present APA in addition to the definitions section[11] and the applicability provision,[12] has the following four main parts: Rule-making, procedure: Licensing; Hearings; and Judicial review.

A. *Rule-making*[13]

Before making a rule [regulation] an agency must hold a public rule-making proceeding.[14] At least twenty days before the hearing, the agency must give public notice, stating the time, place and nature of the proceeding, the authority under which the rule is pro-

[7] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. (1963). Although there are no official copies of unenacted bills, the Legislative Reference Office maintains files of copies as introduced unofficially. (Hereinafter the revised Administrative Procedure Act, as introduced and unenacted will be referred to as H.B. 69. Within the sections of the bill are the sections of the act, and citations to specific portions of the bill will be by reference to the statutory section of the appropriate section of the bill).

[8] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(3) of § 1 at 9: "Shall be entitled to the benefit of legal counsel of his own choosing" was amended by striking the word "legal" before "counsel" and adding the words "or other person" after "counsel" and by adding a poviso that "A person other than a counsel representing a party at a hearing may question or cross-examine witnesses or present argument." It would seem that the effect of the proviso would be to prohibit a "counsel" from questioning or cross-examining witnesses or presenting argument. H. JOURNAL, 44th Colo. Gen. Assem., 1st Sess. at 597 (1963).

[9] The bill was not reported out of the Senate Judiciary Committee by the end of the session and died under state procedure.

[10] COLO. REV. STAT. § 3-16-6 (1963).

[11] COLO. REV. STAT. § 3-16-1 (1963).

[12] COLO. REV. STAT. § 3-16 (1963).

[13] COLO. REV. STAT. § 3-16-2 (1963).

[14] COLO. REV. STAT. § 3-16-2 (1963).

posed, and either the substance of the proposed rule or a description of the subjects and issues involved.[15]

The agency must afford interested persons an opportunity to submit written data, views, or arguments concerning proposed rules. Unless the agency deems it unnecessary, such views can be presented orally at the hearing. In any case, the agency must consider all submissions.[16]

A rule becomes effective on the date prescribed in the rule, but this effective date may not be less than twenty days after publication of the rule's adoption.[17]

A temporary or emergency rule may be adopted without the holding of a hearing and without notice where the agency finds that "immediate adoption of the rule is imperatively necessary for the preservation of public health, safety or welfare, and compliance with the requirements [for notice and postponement of effective date] . . . would be contrary to the public interest."[18]

Any interested person has the right to petition for the issuance, amendment, or repeal of a rule. These petitions are open to public inspection. The agency does not have to act on every petition, but once it has undertaken rule-making on a certain subject, all petitions relevant to the subject matter must be considered and acted upon.[19]

An agency is required to maintain a register of (1) its currently effective rules, (2) the current status of each published proposal for rules, and (3) minutes of all its actions upon rules.[20] Copies of any rule then in effect or of any notice of a proposed rule-making proceeding in which action has not been completed must be made available to the public; the agency must deliver a copy to anyone requesting it and paying the cost of copying. Unless it has been published and made available to the public, no rule can be relied upon or cited by the agency against any person.[21]

Each agency is required to maintain a mailing list, which must include the attorney general and every other person who has requested that he be placed on the list and paid the fee set to cover the mailing cost.[22] The prescribed method of publication or giving of any notice, either of a proposed rule-making proceeding, or of the adoption of a rule, is by mailing a copy to each person on the

[15] COLO. REV. STAT. § 3-16-2(3) (1963).
[16] COLO. REV. STAT. § 3-16-2(4) (1963).
[17] COLO. REV. STAT. § 3-16-2(5) (1963).
[18] COLO. REV. STAT. § 3-16-2(6) (1963).
[19] COLO. REV. STAT. § 3-16-2(7) (1963).
[20] COLO. REV. STAT. § 3-16-2(4) (1963).
[21] COLO. REV. STAT. § 3-16-2(10) (1963).
[22] COLO. REV. STAT. § 3-16-2(11) (1963).

mailing list, and by placing and keeping a copy on permanent file in the agency's office available for public inspection.[23]

Investigation of the practice of a number of specific agencies indicates a wide variation in the practical application of the above provisions. The State Department of Public Welfare charges $12 a year for placing a name on its mailing list. Usually, twenty days before each monthly board meeting, the Department sends a notice of all matters to be considered at the meeting, and after each meeting, it sends another notice of the actions taken. The Colorado State Department of Public Health puts names on its mailing list without charging a fee. However, it has not in all cases followed the law requiring the giving of notice of adoption of regulations; some of its regulations therefore may not be in effect.[24] The Colorado State Board of Pharmacy charges $2 for placement on its mailing list, within the fee renewable upon request from the board. Rule-making proceedings before the pharmacy board are infrequent, and consequently there is no need for frequent mailing of notices. The author's request to be placed on the mailing list of other agencies brought these results: from the State Civil Service Commission, notices of all the examinations to be held; from the Colorado State Department of Employment, nothing; from the Department of Revenue, notices about the new income tax regulations.

B. *Licensing*[25]

A proceeding for the revocation, suspension, annulment, limitation, or modification of a license is not to be commenced until the agency has given the licensee notice in writing of facts or conduct that may warrant such action and has afforded him an opportunity to submit written data, views, and arguments with respect to such facts or conduct.[26] Except in cases of deliberate and willful violation, the licensee must be given reasonable opportunity to comply with all lawful requirements. Such a proceeding is commenced by the filing of a written and signed complaint stating the name of the licensee complained against and the grounds for the requested action. No previously issued license shall be revoked, suspended, annulled, or modified until after a hearing.[27]

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[23] In addition, "each state agency which regulates a public activitiy or which requires forms to be filed by either private or public groups, agencies or businesses . . ." is required to file copies of all rules, regulations and forms with the Legislative Council before the convening of the 1967 General Assembly. HOUSE JOINT RES. 1024, 45th Colo. Gen. Assem., 1st Sess., para. (2)(F) (1965), recorded in Colo. Sess. Laws 1965, at 1503, 1506.

[24] COLO. REV. STAT. § 3-16-2(10) (1963).

[25] COLO. REV. STAT. § 3-16-3 (1963).

[26] COLO. REV. STAT. § 3-16-3(4) (1963).

[27] COLO. REV. STAT. § 3-16-3(6) (1963).

Notwithstanding these requirements, where "the agency has reasonable grounds to believe and finds that the licensee has been guilty of deliberate and willful violation, or that the public health, safety, or welfare imperatively requires emergency action, and incorporates such findings in its order . . ."[28] it may summarily suspend the license without notice.

A licensee who seeks renewal of a license, or who seeks a new license for previously licensed continuing activity, must make timely and sufficient application to the agency. If he does so, his license does not expire until his application is finally acted upon.[29] If the application is denied or the terms of the new license limited, his license does not expire until judicial review has been sought or the time for judicial review has elapsed.[30]

C. *Hearings*[31]

A person entitled to notice of a hearing must be given timely notice of the time, place, nature thereof, the legal authority and jurisdiction under which it is to be held, and the matters of fact and law asserted.[32]

The present law provides that the agency shall preside at the taking of evidence. However, if so provided by law, a member or members of the body which constitute the agency or a hearing commissioner, may preside in lieu of the agency as a body.[33] Whoever the presiding officer is, he must conduct his functions in an impartial manner. He may withdraw if he deems himself disqualified.[34] If any party files an affidavit charging that the presiding officer is personally biased or otherwise disqualified, the presiding officer must determine the issue as a matter of record in the case.[35] The presiding or deciding officer must be independent of supervision or direction by any officer, employee, or agent engaged in the performance of investigatory or prosecuting functions for the agency.[36]

The presiding officer has generally the same authority over the conduct of the hearing as does a judge in the district court.[37]

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[28] COLO. REV. STAT. § 3-16-3(4) (1963).
[29] COLO. REV. STAT. § 3-16-3(7) (1963).
[30] *Ibid.*
[31] COLO. REV. STAT. § 3-16-4 (1963).
[32] COLO. REV. STAT. § 3-16-4(2) (1963).
[33] COLO. REV. STAT. § 3-16-4(3) (1963).
[34] *Ibid.*
[35] *Ibid.*
[36] COLO. REV. STAT. § 3-16-4(6) (1963).
[37] COLO. REV. STAT. § 3-16-4(4) (1963).

He may administer oaths and affirmations, issue subpoenas, rule upon the offers of proof, receive evidence, hear and dispose of motions, and otherwise regulate the course of the hearing.[38] Subpoenas must be issued without discrimination at the request of either public or private parties.[39] Proceedings to enforce a subpoena may be brought in the district court.[40] The court must sustain the subpoena if it is found to be in accordance with law and must issue an order requiring the appearance of witnesses or the production of data under penalty of punishment for contempt in case of contumacious failure to comply with the order of the court.[41]

The rules of evidence, requirements of proof, and procedures before the agency are generally the same as those in civil nonjury cases in the district courts.[42] Usually the proponent of an order has the burden of proof.[43] An agency may take notice of general, technical, or scientific facts within its knowledge, but the fact so noticed must be specified in the record or brought to the attention of the parties before final decision, with opportunity in every party to controvert the fact so noticed.[44] "Every party and every person compelled to testify or to submit data or evidence . . . shall be entitled to the benefit of counsel and to retain, or on payment of reasonable charges therefore to procure, copy of the transcript of the record or any portion thereof."[45]

D. *Judicial Review*[46]

Actions of the agency may be judicially reviewed in two ways: (1) in a civil or criminal action brought by the agency to enforce its action; or (2) in a district court action for review filed by an aggrieved or adversely affected person in accordance with the Colorado Rules of Civil Procedure. Any person affected adversely or aggrieved by reviewable agency action has standing to seek judicial review, whether or not he was a party to the agency action.[47] The action for review may be brought against the agency, individuals comprising the agency, or a person representing the agency or acting

[38] *Ibid.*
[39] COLO. REV. STAT. § 3-16-4(5) (1963).
[40] *Ibid.*
[41] *Ibid.*
[42] COLO. REV. STAT. § 3-16-4(4) (1963).
[43] COLO. REV. STAT. § 3-16-4(7) (1963).
[44] COLO. REV. STAT. § 3-16-4(8) (1963).
[45] COLO. REV. STAT. § 3-16-4(9) (1963).
[46] COLO. REV. STAT. § 3-16-5 (1963).
[47] COLO. REV. STAT. § 3-16-5(3) (1963).

on its behalf in the matter sought to be reviewed. When an agency record has been made, review is on its record.[48] It is, therefore, extremely important that a complete and detailed record be made before the agency. If a record was not made before the agency, or if the alleged procedural errors or irregularities do not appear in the agency record, a record for appellate review is made by trial in the reviewing court.[49]

If the reviewing court finds no error, it shall affirm the agency action. If it finds error, the court must hold unlawful and set aside the agency action, restrain the enforcement of the order or rule under review, compel the agency to take any action which it has unlawfully withheld or unduly delayed, remand the case for further proceedings, or afford such other relief as may be appropriate.[50] Any of the following may be grounds for setting aside agency action: (1) arbitrary or capricious action; (2) denial of statutory right; (3) action contrary to constitutional right, power, privilege, or immunity; (4) action in excess of statutory jurisdiction, authority, purposes, or limitations; (5) action not in accord with the procedures or procedural limitation of the administrative procedure act or otherwise required by law; (6) abuse or clearly unwarranted exercise of discretion; (7) action based upon findings of fact that are clearly erroneous on the whole record; (8) action unsupported by the evidence; or (9) otherwise contrary to law.[51] The decision of the district court may be reviewed by the Supreme Court upon writ of error.[52]

Upon a finding that irreparable injury would otherwise result, the agency must postpone the effective date of the agency action pending judicial review.[53] The reviewing court, whether or not an application for postponement has been denied by the agency, shall, upon a finding of irreparable injury, or to preserve the rights of the parties pending conclusion of the review proceedings, postpone the effective date of agency action, and may enjoin, upon a showing of irreparable injury, the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency.[54] If the court finds that any proceeding contesting

[48] COLO. REV. STAT. § 3-16-5(2) (1963).
[49] COLO. REV. STAT. § 3-16-5(6) (1963).
[50] COLO. REV. STAT. § 3-16-5(7) (1963).
[51] *Ibid.*
[52] *Ibid.*
[53] COLO. REV. STAT. § 3-16-5(5) (1963).
[54] COLO. REV. STAT. § 3-16-5(8) (1963).

the jurisdiction or authority of the agency is frivolous or brought for the purpose of delay, it shall assess against the plaintiff costs and a reasonable sum for attorney's fees [or an equivalent sum in lieu thereof].[55]

II. EXCEPTIONS TO THE APA

Although most of the recently enacted statutes relating to administrative agencies have adopted most or all of the provisions of the APA by reference,[56] many provisions remain, particularly in statutes enacted prior to the APA that do conflict with the APA. The number of conflicts can and should be held to a minimum by strictly and narrowly construing the crucial provision that "where a specific statutory provision applies to a specific agency, such specific statutory provision shall control as to such agency."[57] Only if there is an actual conflict between the APA and the statute applying to any specific agency, does the latter control, and then only to the extent of the specific conflict.

Nevertheless, many areas of major conflict remain. Even a shade of difference between provisions in individual statutes and those in the APA may make an important difference in a particular situation. Statutes relating to some agencies, particularly the Industrial Commission, create great divergence in agency procedures. It would be impractical to enumerate here all the conflicting provisions, but an attempt will be made to set forth the major ones.

A. *Problems of Review*

The most noticeable differences between specific controlling statutes and the APA provisions arise in the area of judicial review. The APA does not specify the county in which judicial review shall commence. However, individual controlling statutes variously provide that review shall commence in the City and County of Denver,[58] in the county of residence or place of business of the appellant or

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[55] *Ibid.*

[56] *E.g.*, Colo. Sess. Laws 1966, ch. 44, § 5(1)(f) at 203; Colo. Sess. Laws 1966, ch. 45, § 7(5)(c) at 219.

[57] COLO. REV. STAT. § 3-16-6 (1963).

[58] COLO. REV. STAT. §§ 15-2-7 (1963) (Board of Examiners of Barbers, unfair practices); 32-2-7 (1963) (Board of Cosmetology, price regulation); 72-1-11 (1963) (Insurance Department, revocation of certificate of authority); 72-5-3 (1963) (Insurance Department, mutual insurance); 72-9-6 (1963) (Insurance Department, mutual benefit associations); 72-10-20 (1963) (Insurance Department, sickness and accident insurance); 72-14-8(1) (1963) (Insurance Department, unfair competition); 72-14-10 (1963) (Insurance Department, unfair competition—intervenors); 73-3-18 (1963) (Bank Commissioner, consumer finance—small loans law); 125-1-22 (1963) (Commissioner of Securities, licensing and practice act).

in which a particular act took place,[59] in any district court in Colorado,[60] or in the federal courts.[61] Some statutes provide that the action in the district court shall be *de novo*,[62] and one provides that the appellant may have a jury trial.[63]

Nowhere is the confusion greater than in denominating the review action. The APA says, "Any other case of review of agency action shall be commenced by the filing of an action for review in the district court in accordance with the rules of civil procedure."[64] Some statutes provide, however, that the review shall be by certiorari,[65] certiorari or other proper method,[66] certiorari or other-

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[59] COLO. REV. STAT. §§ 1-1-9(1) (1963) (Abstracters' Board of Examiners, licensing and regulation); 14-17-9(6) (Supp. 1965) (Banking Department, industrial banks); 32-1-21 (1963) (Board of Cosmetology, registration); 51-1-6(9) (Supp. 1965) (Board of Registration for Professional Engineers); 61-1-25 (1963) (Board of Funeral Directors and Embalmers); 68-2-6 (1963) (restaurant licensing, issuance of license); 68-2-9 (1963) (restaurant licensing, revocation of license); 69-7-7(2) (1963) (Anti-discrimination Commission, fair housing act); 72-1-21 (1963) (Insurance Department, insurance brokers); 72-9-29 (1963) (Insurance Department, mutual benefit associations); 75-1-7 (1963) (liquor licensing, low alcohol content); 75-2-8(2) (1963) (liquor licensing, high alcohol content); 80-4-8(8) (1963) (Industrial Commission, Labor Peace Act); 80-10-10 (1963) (Industrial Commission, theatrical employment agencies); 80-21-8 (1963) (Industrial Commission, antidiscrimination); 112-8-8 (1963) (State Engineer, floating logs on streams); 116-10-13 (1963) (Public Utilities Commission, railroad safety appliances); 116-13-11 (1963) (Public Utilities Commission, railroad employees); 125-7-14 (1963) (Bank Commissioner, money order act); 129-3-3(24) (1963) (Secretary of State, bingo and raffles law); 138-5-3(5) (1963) (Director of Revenue, sales and use tax); 138-9-4(2) (Supp. 1965) (Director of Revenue, income ton mile, sales and use tax, cigarette and motor fuel taxes); 145-1-2(5)(c) (1963) (Board of Veterinary Medicine); 148-5-12 (Supp. 1965) (State Engineer, reservoir storage rights); 148-11-17 (1963) (State Engineer, water flow and diversions for irrigation); 148-18-14 (Supp. 1965) (State Engineer, ground water management act).

[60] COLO. REV. STAT. § 125-2-4 (1963) (Commissioner of Securities, investment contracts).

[61] COLO. REV. STAT. §§ 100-6-11 (1963) (Oil and Gas Conservation Commission, conservation act: "if it [the district court] otherwise has jurisdiction. . . ."); 125-2-4 (1963) (Commissioner of Securities, investment contracts: "in proper case, to the federal courts."). See generally 28 U.S.C. §§ 1331-61 (1948) (jurisdiction of the district courts); U.S. CONST. art. III, § 1. *E.g.*, 28 U.S.C. § 1342 (1948). The jurisdiction stated in the Colorado Revised Statutes sections mentioned above is in addition to concurrent jurisdiction in the state courts.

[62] COLO. REV. STAT. §§ 1-1-9 (1963) (Abstracters' Board of Examiners, licensing and regulation); 13-16-3 (1963) (Bank Commissioner, licensing of retail instalment sales of motor vehicles companies); 61-1-25 (1963) (Board of Funeral Directors and Embalmers); 72-1-11 (1963) (Insurance Department, revocation of certificate of authority of insurance companies); 72-1-21(4) (1963) (Insurance Department, insurance brokers); 100-6-13 (1963) (Oil and Gas Conservation Commission, conservation act); 125-2-4 (1963) (Commissioner of Securities, investment contracts); 138-9-4(2)(b) (Supp. 1965) (Director of Revenue, income, ton mile, motor fuel, cigarette, sales and use taxes); 148-18-14(4) (Supp. 1965) (State Engineer, ground water management act).

[63] COLO. REV. STAT. § 72-1-21(4) (1963) (Insurance Department, insurance brokers).

[64] COLO. REV. STAT. § 3-16-5(4) (1963).

[65] COLO. REV. STAT. §§ 62-6-15(3) (1963) (Game and Fish Commission, fur-bearing animals, fur dealers licenses); 91-5-10 (1963) (Board of Examiners in the Basic Sciences, licensing to practice the "healing art").

[66] COLO. REV. STAT. § 75-1-7(6) (1963) (liquor licensing, low alcohol content fermented malt beverages).

wise,[67] appeal or writ of certiorari,[68] writ of certiorari or review,[69] certiorari as is provided in the APA,[70] and mandamus or otherwise.[71] Moreover, the Colorado Supreme Court has said that there is a statutory review provided for by the APA which is not necessarily a review under Rule 106 of the Rules of Civil Procedure.[72] These differences in language and interpretation may suggest the possibility of conflicts even though the ramifications of such possibility remain unclear.

Prescribed procedures for initiating review are varied. The statute concerning liquidation of banks provides that "Notice of review in the district court shall be filed with said bank commissioner within thirty days after his decision is announced, whereupon the state bank commissioner shall report the facts to the court with a petition that said court pass upon the validity of the claim."[73] A taxpayer may take an appeal from action of the Director of Revenue by filing with the clerk of the court a copy of the notice of final determination received by the taxpayer together with a written notice stating that the taxpayer appeals to the district court and alleging the pertinent facts upon which such appeal is grounded.[74] Appeals from the Board of Funeral Directors and Embalmers are made by filing notice in writing of such appeal with the clerk of the district court and mailing a copy of such notice of appeal to the secretary of the board.[75]

Under the Rules of Civil Procedure an agency would have twenty days to file its answer. Statutes applicable to the Board of Examiners of Barbers and to the Commissioner of Securities require the agency to file its answer in ten days.[76]

Although the APA does not require the furnishing of security on judicial review, some statutes require the appellant to put up a bond, usually for costs.[77] A public utility appealing a decision of

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[67] COLO. REV. STAT. § 75-2-8(2) (1963) (liquor licensing, high alcohol content).

[68] COLO. REV. STAT. § 72-14-7(2) (1963) (Insurance Department, unfair competition).

[69] COLO. REV. STAT. §§ 115-6-15(1) to -16(1) (1963) (Public Utilities Commission, conduct of hearings and investigations).

[70] COLO. REV. STAT. § 138-3-12 (Supp. 1965) (Director of Revenue, cigarette tax).

[71] COLO. REV. STAT. §§ 68-2-6 (1963) (Department of Health, issuance of restaurant license); 68-2-9 (1963) (Department of Health, revocation of restaurant license).

[72] Theobald v. District Court, 148 Colo. 466, 366 P.2d 563 (1961).

[73] COLO. REV. STAT. § 14-14-11 (1963) (Banking Department, liquidation of banks).

[74] COLO. REV. STAT. § 138-9-4(3) (Supp. 1965) (Director of Revenue, ton mile, motor fuel, cigarette, income, sales and uses taxes).

[75] COLO. REV. STAT. § 61-1-25(2) (1963) (Board of Funeral Directors and Embalmers).

[76] COLO. REV. STAT. §§ 15-2-7(2) (1963) (Board of Examiners of Barbers, unfair practices); 125-2-4(1) (1963) (Commissioner of Securities).

[77] COLO REV. STAT. §§ 1-1-9(1) (1963) (Abstracters' Board of Examiners, licensing and regulation); 13-11-17 (1963) (Motor Vehicle Dealers' Administrator and Advisory Board, dealers' licenses); 112-8-8 (1963) (State Engineer, floating logs on streams); 148-11-17(3) (1963) (State Engineer, water flow and diversions for irrigation).

the state tax commission must pay the full amount of all taxes levied upon the valuation for assessment of its property and plant prior to taking its appeal.[78] One very obnoxious and unfair provision of doubtful constitutionality is the provision that before taking an appeal a taxpayer must file with the district court a bond in twice the amount of the taxes, interest, and other charges stated in the final determination by the director of revenue or at his option deposit the stated amount of taxes with the director of revenue in lieu of posting bond.[79] The fact that in one district court case[80] the state did not raise the issue of the failure of the taxpayer to comply with either of these provisions may indicate that the agency also doubts the validity of the provisions.

Another statute provides that no suit shall be maintained in any court to restrain or prevent the collection of the motor fuel tax, but an aggrieved distributor shall pay the tax, penalty, and interest under protest and may institute suit within ninety days to recover such taxes and penalty.[81]

Under the APA, the filing of an action for review does not automatically stay the decision of the agency. However, the APA does provides that the agency or the court may postpone the effective date of agency action, upon a finding that irreparable injury would otherwise result, or to preserve the rights of the parties pending conclusion of the review proceedings.[82] Some statutes provide that the filing of an action for judicial review shall automatically

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[78] COLO. REV. STAT. § 137-4-9(2) (Supp. 1965) (State Board of Equalization, ad valorem general property tax). The provision has doubtful constitutionality.

[79] COLO. REV. STAT. § 138-9-4(4) (Supp. 1965) (Director of Revenue, income, ton mile, passenger mile, motor fuel, cigarette, sales and use taxes). The constitutional objection is that a person should not be required to file an appeal bond in a penal sum, particularly in a sum double the taxes, interest "and other charges" when the taxpayer has never been in court about the validity of the sum alleged. If the taxpayer has already been in court, and is taking an appeal *to a higher court from a lower court,* there is a distinguishable fact, *e.g.,* COLO. REV. STAT. § 37-6-11 (1963) (Repealed, Colo. Sess. Laws 1964, ch. 45, § 73, at 436, replaced by § 54, at 428) provided that appeals from county court were conditioned on bond double the amount of a *money judgment.* See also COLO. REV. STAT. §§ 139-36-8 to -10 (1963), for appeals from a municipal court. In Mardi, Inc. v. City and County of Denver, 151 Colo. 28, 375 P.2d 682, noted in 40 DEN. L.C.J. 149 (1962), the supreme court considered the provision of the ad valorem tax law that required payment of taxes before taking appeal, COLO. REV. STAT. § 137-3-38 (1963). The court did not address itself to the question of whether the bond or payment of taxes was invalid in all instances but held that it was invalid as it applied to Mardi. The taxes normally do not have to be paid until March, and therefore, the fact that a taxpayer appeals before March does not accelerate his duty to pay taxes before filing the appeal. The basic question, whether any taxpayer must pay remains unanswered. However, referring to other cases, the court said that appeals from administrative determinations should be subject to liberal rules of statutory construction, "when, as here, the appealing parties have acted in good faith and with reasonable promptness." 151 Colo. at 34, 375 P.2d at 685.

[80] Henry v. Theobald, Civil No. B-39283, D. Colo., 1957. Compare Liebhardt v. Department of Revenue, 123 Colo. 369, 229 P.2d 655 (1951), on tax questions involved in a prior estate.

[81] COLO. REV. STAT. § 138-2-16 (1963) (Director of Revenue, motor fuel tax).

[82] COLO. REV. STAT. § 3-16-5(5) (1963).

postpone the effective date of the agency action.[83] Other statutes provide that the effective date of the agency action shall not be stayed except upon notice to the agency and the furnishing of a bond,[84] or without the furnishing of a bond,[85] or without notice and hearing.[86] Two statutes provide that the determination of the agency is final until final determination of the court review.[87]

Grounds for setting aside agency action are as varied in specific agency statutes as the hues of the rainbow. However, many of such statutes, even though at some variance with the APA are not sufficiently different from the APA to justify separate or detailed consideration. Briefly enumerated, particular statutory grounds include a finding or determination that: the agency abused its discretion or exceeded its jurisdiction; [88] the action was unlawful or unreasonable,[89] was without good cause,[90] was arbitrary and without good cause,[91] was arbitrary and without just cause,[92] or arbitrary,[93] was unreasonable, unjust, arbitrary or capricious or violated any constitutional right of the party;[94] the agency acted without or in excess of its power; the finding, order or award was procured by fraud; that the award does not do substantial justice to the parties;[95] or that the agency was guilty of gross negligence or an abuse of

[83] COLO. REV. STAT. §§ 1-1-9 (1963) (Abstracters' Board of Examiners, licensing and regulation); 7-4-10 (1963) (Department of Agriculture, commission and brokerage marketing); 7-12-8(2) (1963) (Department of Agriculture, frozen food provisioner's law); 61-1-25 (2) (1963) (Board of Funeral Directors and Embalmers); 72-10-20 (1963) (Insurance Department, sickness and accident insurance); 80-4-8(10) (1963) (Industrial Commission, labor peace act); 80-21-8(10) (1963) (Industrial Commission, antidiscrimination); 112-8-9 (1963) (State Engineer, floating logs on streams).

[84] COLO. REV. STAT. §§ 15-2-7(3) (1963) (Board of Examiners of Barbers, unfair practices); 32-2-7(4) (1963) (Board of Cosmetology, price regulation); 129-3-3(24)(d) (1963) (Secretary of State, bingo and raffles).

[85] COLO. REV. STAT. §§ 72-1-11(3) (1963) (Insurance Department, revocation of certificate of authority of insurance companies); 100-6-12 (1963) (Oil and Gas Conservation Commission, conservation act); 115-6-16(3) (1963) (Public Utilities Commission, hearings and investigations).

[86] COLO. REV. STAT. § 80-1-38 (1963) (Industrial Commission, powers and duties).

[87] COLO. REV. STAT. §§ 13-11-17 (1963) (Motor Vehicle Dealers' Administrator and Advisory Board); 148-5-12 (Supp. 1965) (State Engineer, reservoir storage rights).

[88] COLO. REV. STAT. § 14-17-2(6) (Supp. 1965) (Banking Department, industrial banks).

[89] COLO. REV. STAT. § 15-2-7(2) (1963) (Board of Examiners of Barbers, unfair practices).

[90] COLO. REV. STAT. §§ 68-2-6 (1963) (Department of Health, issuance of restaurant license); 68-2-9 (1963) (Department of Health, revocation of restaurant license).

[91] COLO. REV. STAT. § 75-1-7(6) (1963) (liquor licensing authorities, fermented malt beverage, low alcohol content).

[92] COLO. REV. STAT. § 138-1-84 (Supp. 1965) (Director of Revenue, income tax).

[93] COLO. REV. STAT. § 75-2-8(2) (1963) (liquor licensing authorities, hard liquor).

[94] COLO. REV. STAT. § 100-6-13 (1963) (Oil and Gas Conservation Commission, conservation act).

[95] COLO. REV. STAT. §§ 80-1-40(1)(e) (1963) (Industrial Commission, powers and duties); 81-14-12 (1963) (Industrial Commission, workmen's compensation procedure).

discretion.[96] In the case of one agency specific grounds for setting aside its action on review are not enumerated, but rather the "court shall make such decree . . . as to the court may seem just and proper."[97]

B. *Problems with rule-making*

The APA varies greatly from particular statutory provisions concerning rule-making. Some statutes provide for a different time of notice of rule-making than that prescribed by the APA[98] and others for a different lapse of time between adoption and effective date.[99] The statute controlling the Oil and Gas Conservation Commission provides that a temporary rule shall not be effective for more than fifteen days.[100]

In some instances, notice of rule-making proceedings or of the adoption of a rule, or both, is to be given by newspaper publication.[101] One statute permits newspaper publication of a notice of rule-making proceeding in lieu of personal service.[102] Some agencies are required to give notice of the adoption of rules by posting on

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[96] COLO. REV. STAT. § 128-1-10 (1963) (Board of Appeals of Soil Conservation Board, soil conservation districts).

[97] COLO. REV. STAT. § 51-2-10(7) (1963) (Board of Registration for Professional Engineers, surveyors).

[98] COLO. REV. STAT. §§ 6-13-12 (1963) (Department of Agriculture, commercial fertilizers, 10 days); 66-15-5(3)(b) (1963) (Department of Public Health, enriched flour and bread, 10 days); 66-21-5(1)(a) (1963) (Department of Public Health, hazardous household substances labeling act, 30 days); 100-6-7(2) (1963) (Oil and Gas Conservation Commission, conservation act, 10 days).

[99] COLO. REV. STAT. §§ 7-3-12 (1963) (Department of Agriculture, marketing orders, 5 days); 62-2-13(1) (1963) (Game, Fish and Parks Commission, 2 days); 66-15-5 (3)(b) (1963) (Department of Public Health, enrichment of flour and bread act, 30 days); 66-20-19(3) (1963) (Department of Public Health, pure food and drug law, 60 days unless in case of emergency); 66-21-5(1)(a) (1963) (Department of Public Health, hazardous household substances labeling act, 60 days); 73-3-11(1) (1963) (Bank Commissioner, consumer finance law—small loans, 30 days); 80-1-9(7) (1963) (Industrial Commission, rules and regulations, 10 days); 80-1-10(1) (1963) (Industrial Commission, orders, 10 days); 80-4-3(4) (Supp. 1965) (Industrial Commission, labor peace act, 10 days); 80-7-10(2) (1963) (Industrial Commission, minimum wage for women and children, Wage Board, 30 days); 81-7-8 (1963) (Industrial Commission, workmen's compensation, 10 days); 82-3-2 (1963) (Department of Employment, employment security, 10 days).

[100] COLO. REV. STAT. § 100-6-7(15) (1963) (Oil and Gas Conservation Commission).

[101] COLO. REV. STAT. §§ 7-3-12 (1963) (Department of Agriculture, marketing act of 1939, adoption); 7-5-6 (1963) (Department of Agriculture, fruits and vegetables, adoption); 7-5-7 (1963) (Department of Agriculture, fruits and vegetables, adoption); 62-2-13 (1963) (Game, Fish and Parks Commission, adoption); 66-15-5(5) (1963) (Department of Public Health, enrichment of flour and bread act, both); 66-21-5(1)(a) (1963) (Department of Public Health, hazardous household substances labeling act, both); 80-7-10(1) (1963) (Industrial Commission, Wage Board, minimum wage for women and children, adoption); 82-3-2 (1963) (Department of Employment, employment security, adoption).

[102] COLO. REV. STAT. §§ 148-18-11 (Supp. 1965) (State Engineer, Ground Water Commission, ground water management act); 148-18-30 (Supp. 1965) (State Engineer, Ground Water Commission, board of directors of ground water management district, ground water management act). One statute allows newspaper publication as an alternative. See COLO. REV. STAT. § 100-6-7(4) (1963) (Oil and Gas Conservation Commission, conservation act).

a bulletin board in the office of the agency;[103] other agencies must file adopted rules with the secretary of state.[104] Some statutes provide that notice of rule-making proceedings or notice of the adoption of rules, or both, shall be sent to all licensees or all persons known to be interested, or all persons of a particular class.[105] Finally, one statute specifically provides that the provisions of the APA are not applicable to rule-making proceedings.[106]

C. *Problems in licensing*

The APA requires a complaint for the suspension or revocation of a license to be in writing and signed by the complainant. The more strict requirement of several statutes is that such a complaint be either under oath or verified.[107] The statute pertaining to the Industrial Commission provides that a complaint of violation of the law regarding wage equality between the sexes must be verified.[108]

Some statutes provide that a license shall be suspended or revoked by operation of law,[109] and one of these provides that the certificate shall be revoked by operation of law without hearing.[110] Certainly these phrases cannot be taken literally, because the licensee would be entitled to a hearing at least on the question of whether or not "operation of law" has set in.

The APA provides for the emergency suspension of a license without notice and without a hearing, where "the agency has rea-

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[103] COLO. REV. STAT. §§ 15-2-5(1) (1963) (Board of Examiners of Barbers, unfair practices); 32-2-5(1) (1963) (Board of Cosmetology, price regulation); 80-1-9(7) (1963) (Industrial Commission); 81-15-26 (1963) (Industrial Commission, workmen's compensation insurance rates).

[104] COLO. REV. STAT. §§ 10-1-4(4) (1963) (Board of Examiners of Architects); 82-3-2 (1963) (Department of Employment, employment security).

[105] COLO. REV. STAT. §§ 2-1-20 (1963) (Board of Accountancy); 7-3-5(3) (1963) (Department of Agriculture, marketing act of 1939); 7-5-7 (1963) (Department of Agriculture, fruits and vegetables act, interested persons); 73-3-11 (1963) (Bank Commissioner, consumer finance—small loan law); 80-7-10(2) (1963) (Industrial Commission, Wage Board, minimum wage for women and children); 81-7-8 (1963) (Industrial Commission, workmen's compensation); 148-18-30 (Supp. 1965) (State Engineer, board of directors of ground water management district).

[106] "The provisions of article 16 of chapter 3, C.R.S. 1963, shall not be applicable, except that 3-16-5, Colorado Revised Statutes 1963 shall apply" Colo. Sess. Laws 1966, ch. 7, § 6, at 11 (Department of Highways, junkyards) (to be codified to COLO. REV. STAT. § 120-16-6).

[107] COLO. REV. STAT. §§ 11-3-8(2) (Supp. 1965) (Bank Commissioner, debt adjustment); 51-1-6(6) (Supp. 1965) (Board of Registration for Professional Engineers); 51-2-10(2) (1963) (Board of Registration for Professional Engineers, surveyors); 97-1-22(1) (1963) (Board of Nursing, professional nursing practice act).

[108] COLO. REV. STAT. § 80-3-3 (1963) (Industrial Commission, wage equality between sexes act).

[109] COLO. REV. STAT. § 123-17-21(3) (1963) (Department of Education, teachers' certificates, suspended without a hearing); Colo. Sess. Laws 1966, ch. 39, §§ 4(9), at 183 (agent's permit); 5(6)(a) at 185 (proprietary school certificate); 10(2) at 189 (revocation of permits and certificates). (Proprietary School Act of 1966 to be codified to COLO. REV. STAT. § 146-3-1).

[110] COLO. REV. STAT. § 123-17-21(3) (1963) (Department of Education, teacher's certificate).

sonable grounds to believe and finds that the licensee has been guilty of deliberate and willful violation, or that the public health, safety, or welfare imperatively requires emergency action. . . ."[111] A number of statutes place a limitation of time on the period during which such emergency suspension shall be in effect.[112] One statute provides for 3 days' written notice and a hearing before even making an emergency suspension.[113]

D. *Other problem areas*

The APA is very explicit that *ex parte* testimony cannot be taken. However, one statute provides that the agency with or without notice to either party, "may cause testimony to be taken. . . . All *ex parte* testimony taken by the commission shall be reduced to writing and either party shall have opportunity to examine and rebut the same on final hearing."[114]

Under the APA the "rules of evidence and requirements of proof shall conform, to the extent practicable, with those in civil nonjury cases in the district courts."[115] However, several statutes provide that the specific agency is not bound by technical rules of evidence or strict rules of procedure.[116]

There is some confusion in the statutes concerning the enforcement of an agency subpoena. The APA recognizes the ordinary method of proceeding — application to the court for a court order requiring obedience to the subpoena, with punishment by the court for contempt of its order in case there is refusal to comply.[117] Some statutes make it a misdemeanor to willfully ignore an agency sub-

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[111] COLO. REV. STAT. § 3-16-3(4) (1963).

[112] COLO. REV. STAT. §§ 6-14-4(6) (1963) (Department of Agriculture, application of agricultural chemicals, 10 days); 14-19-12(1) (1963) (Banking Department, funeral contract trust funds, 30 days); 62-6-16(4) (1963) (Game, Fish and Parks Commission, fur dealers, 6 months); 68-2-9 (1963) (Department of Health, hotel or restaurant license, 6 months); 75-2-11(2) (1963) (liquor licensing authorities, summary suspension for 15 days, suspension for 6 months); 100-6-7(3) (1963) (Oil and Gas Conservation Commission, 15 days); 129-3-3(2) (1963) Secretary of State, bingo and raffles law, 30 days); 129-3-3(7) (1963) (Secretary of State, bingo and raffles law, may stop game pending a hearing not later than 10 days).

[113] COLO. REV. STAT. § 14-19-12(1) (1963) (Banking Department, funeral contract trust funds).

[114] COLO. REV. STAT. § 80-1-35(3) (1963) (Industrial Commission). Compare COLO. REV. STAT. § 81-14-3(3) (1963) (Industrial Commission, workmen's compensation).

[115] COLO. REV. STAT. § 3-16-4(7) (1963).

[116] COLO. REV. STAT. §§ 2-1-21(6) (1963) (Board of Accountancy); 10-1-21(2) (1963) (Board of Examiners of Architects); 23-1-16(2) (1963) (Board of Chiropractic Examiners); 69-7-6(11) (1963) (Antidiscrimination Commission, fair housing); 72-14-6(3) (1963) (Insurance Department, unfair competition); 80-1-22 (1963) (Industrial Commission); 80-1-28 (1963) (Industrial Commission); 80-7-7 (1963) (Industrial Commission, Wage Board, minimum wage of women and children); 80-21-7 (11) (1963) (Industrial Commission, antidiscrimination); 82-5-7(1) (1963) (Department of Employment, employment security—unemployment compensation); 91-6-16(2) (1963) (Board of Physical Therapy); 97-1-22(2) (1963) (Board of Nursing); 115-6-1 (1963) (Public Utilities Commission).

[117] COLO. REV. STAT. § 3-16-4(5) (1963).

poena[118] — a provision of doubtful constitutionality. Perhaps the most illustrative example of this confusion is the procedure for enforcement provided by the legislature if a taxpayer fails or refuses to respond to a subpoena. In such a case the judge, upon application, "may cause arrest of such person, and upon hearing, said judge shall have, for the purpose of enforcing obedience to the requirements of said subpoena, power to make such order as, in his discretion, he deems consistent with the law for punishment of contempts."[119] This provision was adopted in 1965 despite court decisions indicating that such procedure is undoubtedly unconstitutional and could not be upheld by a court. The bill drafters and legislators who should have been enlightened by and benefited from such decisions nevertheless ignored them in approving this clause.

III. PROPOSAL FOR REFORM

The best method to overcome the major shortcomings of the APA would be the adoption of the revised State Administrative Procedure Act (hereinafter revised act) presented by the Administrative Law Committee of the Colorado Bar Association to the Colorado General Assembly in 1963.[120] The 1963 bill would have done away with many of the conflicts between the APA and other statutes by specifically repeating sections in those statutes which deviated from the APA.[121] The proposed revisions to the APA itself included a number of changes of considerable materiality, along with improvements in language which clarified, but did not substantially change, the meaning of certain provisions.[122] The changes of greatest materiality will be discussed here.

The revised act offically designates the act as the "State Administrative Procedure Act,"[123] the name it has had unofficially from the beginning.

A. *Hearing officers*

The greatest single change is the provision for the appointment of hearing officers and the conducting of hearings by such officers.[124] The bill provides that "at a hearing only one of the follow-

[118] COLO. REV. STAT. §§ 80-8-13 (1963) (Industrial Commission, wage law); 81-14-21 (1963) (Industrial Commission, workmen's compensation); 82-3-8(2) (1963) (Department of Employment, employment security); 117-1-15 (1963) (Real Estate Brokers Board).

[119] COLO. REV. STAT. § 138-9-11(2) (Supp. 1965) (Director of Revenue).

[120] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. (1963).

[121] *Ibid.*

[122] *Ibid.*

[123] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-7 of § 1, at 21 (1963).

[124] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4 of § 1, at 8-17 (1963).

ing may preside: The agency; a hearing officer appointed in accordance with subsection [9] of this section, or if otherwise authorized by law a hearing officer, who, if authorized by law may be a member of the body which comprises the agency."[125]

Although a number of agencies have their own hearing officers,[126] it was necessary the revised act provide for a panel of hearing officers for those agencies that do not have their own. Under the above provision an agency could conduct a hearing through its own hearing officer, or through a hearing officer selected from the panel.

Subsection [9][127] provides that in order to maintain an adequate panel of qualified hearing officers, the governor shall appoint a sufficient number of hearing officers, each of whom shall continue as a member of the panel for a period of six years unless removed for cause by the governor. All hearing officers must be attorneys at law duly admitted to practice before the Supreme Court of Colorado, must have been practicing attorneys in Colorado for at least three years, and must be familiar with the conduct of administrative proceedings. The officers on the panel would not all be members of the same political party. They would not be under civil service. A member of the panel would be designated as chief hearing officer and would receive a salary of $100 a month in addition to other compensation provided for. When an agency wished to delegate the holding of a hearing to an officer appointed in accordance with this sub-section, it would so advise the chief hearing officer, who would then select an officer to hold the hearing. Hearings would be apportioned, so far as practicable, equally among the respective hearing officers. Notwithstanding this, the chief hearing officer would consider the potential hearing officer's knowledge of the field of law involved, his place of residence, the place where the hearing would be held, and all other factors. The hearing officer would receive from the agency $50 for each one-half day, or $100 for each full day engaged in the conduct of hearings or matters directly connected therewith; and if the hearing were held outside the place of residence of the hearing officer, he would receive mileage at the statutory rate and necessary subsistence expenses. The bill provides that the hearing officer may employ a court reporter, who shall be paid by the agency, to attend the hearing and record the proceedings or he may cause the proceedings to

[125] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4 of subsection 8, at 11. Compare COLO. REV. STAT. § 3-16-4 (1963).

[126] *E.g.*, State Water Pollution Control Commission, Colo. Sess. Laws 1966, ch. 44, § 5(1)(h) at 203; Air Pollution Variance Board, Colo. Sess. Laws 1966, ch. 45, § 7(5)(c) at 219.

[127] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(9) of § 1, at 12 (1963).

be recorded by electronic recording device. When required, the hearing officer shall cause the proceedings to be transcribed, the cost to be paid by the agency or the party ordering the transcription. If the agency acquires a copy of the transcription, its copy must be made available to any party at reasonable times for inspection and study.

The record made by the hearing officer or agency conducting a hearing includes all pleadings, applications, evidence, exhibits, other papers presented or considered, matters officially noticed, rulings upon exceptions, any findings of fact and conclusions of law proposed by any party, and any written brief filed.[128] Oral argument may be permitted.[129] No *ex parte* material or representation of any kind may be received or considered. The agency or hearing officer with the consent of all parties may eliminate or summarize any part of the record where this may be done without affecting the decision.[130]

When a hearing officer has conducted the hearing, he must prepare and file an initial decision which the agency shall serve upon each party, unless all parties with the consent of the agency have expressly waived their right to have an initial decision rendered by such hearing officer.[131] Each initial decision must include a statement of findings and conclusions upon all the material issues of fact, law, or discretion presented on the record, and the appropriate rule, order, sanction, relief, or denial thereof.[132] In the absence of an appeal to the agency or a review upon motion of the agency itself within thirty days after service of the initial decision, the initial decision of the hearing officer shall become the decision of the agency.[133]

For the the purpose of review by the agency of the initial decision of the hearing officer, either upon appeal or upon the agency's own motion, the record includes — in addition to the findings, conclusions and rulings stated in the initial decision — any exceptions and briefs filed. The agency may permit oral argument on review, but no other material may be considered.[134] The findings of evidentiary fact as distinguished from ultimate conclusions of fact made by the hearing officer in his initial decision shall not be set aside by the agency, unless such findings of evidentiary fact are

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[128] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(14) (1963).

[129] *Ibid.*

[130] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(13) of § 1, at 15 (1963).

[131] *Ibid.*

[132] *Ibid.*

[133] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(13) of § 1, at 16 (1963).

[134] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(14) (1963).

contrary to the weight of the evidence.[135] The agency may remand the case to the hearing officer for further proceedings; or it may affirm, set aside, or modify his order so that the sanction or relief entered therein will conform with the facts and the law.[136]

The initial decision of the hearing officer, or if the agency conducts the hearing, its decions, shall be served on each party by personal service or first class mail and shall be effective as to such party on the date mailed or such later date as is stated in the decision.[137]

B. *Evidentiary Rules*

Relief from the strict rules of evidence is provided by the addition in the revised act of the following provision: "However, when necessary to do so in order to ascertain facts affecting the substantial rights of the parties to the proceeding, the person so conducting the hearing may receive and consider evidence not admissible under such rules, provided it possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs."[138] The revised act also provides that documentary evidence may be received in the form of a copy or excerpt if the original is not readily available, provided that upon request the opposing party shall be given an opportunity to compare the copy with the original. Also, an agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.[139]

C. *Judicial Review*

The revised act restates more clearly the proposition in the present act that two methods of judicial review of agency action are available to an adversely affected or aggrieved party. He may defend a court action brought by the agency to seek enforcement, or he may commence a separate action against the agency in the district court in accordance with the rules of civil procedure.[140] Two important qualifications are added by the revised act, however. Firstly, contrary to the APA, which does not limit the time

[135] *Ibid.*

[136] *Ibid.*

[137] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(15) of § 1, at 17 (1963).

[138] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(11) of § 1, at 15 (1963). See note 116 *Supra* and accompanying text.

[139] *Ibid.* Compare COLO. REV. STAT. § 3-16-4(8) (1963).

[140] *Compare* COLO. REV. STAT. § 3-16-5 (1963), *with* H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-5 of §1, at 17-18, *and with* Revised Model State Administrative Procedure Act § 15 [hereinafter referred to as Model Act], and notes 58-71 *supra* and accompanying text.

within which review may be sought, the revised act provides that the independent action for review must be brought within sixty days after the agency action becomes effective.[141] And secondly, while under the present act any person may commence an action for judicial review, under the revised act only a party to the agency action has standing to commence such an action for judicial review.[142]

Judicial review is also affected by the following changes in the revised act. A court may require a party who seeks an order of court postponing agency action to comply with terms and to provide security before the court enters such an order. Parties to a review action may reduce the record by stipulation. The revised act provides that, before seeking review of a district court action in the Supreme Court, a party must file with the district court a notice of intent to seek such review.[143] If no notice of intent to seek Supreme Court review is filed with the trial court within such thirty days, the trial court shall immediately return the agency's record to it. When the Supreme Court disposes of a case, it returns the agency record to the trial court if further proceedings are required in the trial court; if no further proceedings are necessary, it either returns the record directly to the agency or the trial court, which must then forward the record to the agency. Both the district court and the Supreme Court shall advance on the docket any case which in the discretion of the court requires acceleration.[144]

D. *Additional Improvements*

The word "rule" is used throughout the present APA, and the word "regulation" is ignored. The revised act provides that the "words 'rule' and 'regulation' are synonymous and may be used interchangeably."[145]

The present law requires the rule to state the effective date in the rule, which shall not be earlier than twenty days after adoption. The revised act provides that a rule goes into effect twenty days after publication unless a later effective date is stated in the rule.[146]

The revised act eliminates the provision that the agency must issue a concise statement of the matters considered in adopting or

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[141] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-5(4) (1963).

[142] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-5(3) (1963).

[143] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-5(9) (1963).

[144] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-5(10) (1963).

[145] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-1(1)(d) of § 1, at 1-2. *Compare* COLO. REV. STAT. § 3-16-1(1)(d) (1963), *with* Model Act § 1(7).

[146] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-2(4) of § 1, at 4 (1963). *Compare* COLO. REV. STAT. § 3-16-2(5) (1963), *with* Model Act § 4(b).

rejecting a rule and the reasons therefore.[147] This provision has not been effectively followed to date.[148]

The revised act eliminates the provision that "no revocation, suspension, annulment, limitation or modification by any agency of a license shall be lawful unless, before institution of agency proceedings therefor, the agency shall have given the licensee notice in writing of facts or conduct that may warrant such action, afforded the licensee opportunity to submit written data, views, and arguments with respect to such facts or conduct, and except in cases of deliberate and willful violation, given the licensee a reasonable opportunity to comply with all lawful requirements."[149] Under the revised act, an agency must act promptly on an application for license and immediately after the taking of action give written notice of the action to the applicant.[150]

An agency upon its own motion may commence proceedings for the revocation, suspension, annulment, limitation or modification of a previously issued license, but if a complaint is filed by someone else, the complaint must be signed and sworn to.[151]

The revised act does not affect statutory powers of an agency to issue an emergency order where the agency finds and states of record that immediate issuance of the order is imperatively necessary for the preservation of public health, safety, or welfare and observance of the requirements of notice of hearing would be contrary to the public interest. Any person against whom an emergency order is issued is entitled upon request to an immediate hearing.[152]

The revised act provides that witnesses at agency hearings are entitled to the same fees and mileage provided for witnesses in a court of record.[153]

Each agency must proceed with reasonable dispatch to conclude any matter presented to it, giving prompt notice of refusal to accept for filing or denial in whole or in part of any written application or other request. Upon a showing to a court that there has been undue delay in connection with any such proceeding or

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[147] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-2(4) of § 1 at 4 (1963). Compare Model Act § 3(a)(2), which also requires a concise statement of reasons.

[148] See p. 19 *supra.*

[149] COLO. REV. STAT. § 3-16-3(3) (1963); Compare, H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-3 of § 1, at 6-8 (1963); Model Act § 14(c).

[150] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-3(3) of § 1, at 6-7 (1963). Compare note 147 *supra.*

[151] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-3(8) of § 1, at 8 (1963). Compare COLO. REV. STAT. § 3-16-3(5) (1963).

[152] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-3(7) of § 1, at 7. Compare COLO. REV. STAT. § 3-16-3(4) (1963); Model Act § 14(c).

[153] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(4) of §1, at 10 (1963).

action, the court may direct the agency to decide the matter promptly.[154]

Every agency must provide by rule for the discretionary entertaining and prompt disposition of petitions for declaratory orders terminating controversies or removing uncertainties. Orders disposing of such petitions shall constitute agency action subject to judicial review.[155]

One very desirable addition to the revised act which was not incorporated in the version presented to the General Assembly in 1963 is a provision for the establishment of a Colorado Regulations Register.[156] Everything required by the APA to be published should be published in a register to be issued by the secretary of state or other state officer. All persons should be entitled to be on a mailing list to receive all or part of the publications made in the register. The officer making publication should determine the fee to be charged for making mailings, and copies of the register should be readily available at stated places, for example in the Supreme Court Library and the office of the clerk of each district court. There should also be a provision requiring each agency to deliver to a designated officer a copy of each regulation of the agency in effect on a given date and requiring the agency to publish all such regulations in the regulations register.

CONCLUSION

The Colorado Administrative Procedure Act arose out of need or expediency demanding coordination and an explicit statement of the statutory provisions regulating procedures of the state's many administrative agencies. Hopefully such action would achieve uniform procedures for all agencies within the state. Although the APA has performed a major function in regulating those procedures since its enactment, it does not achieve the uniformity of procedure which is highly desirable for our rapidly growing structure of agencies.

Procedures of individual agencies are still too much governed by specific statutes applicable only to specific agencies. Confusion is particularly apparent in the area of judicial review, where the statutes state myriad provisions for initiating appeal and grounds

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[154] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(6) of § 1, at 11 (1963).

[155] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(7) of § 1, at 11 (1963).

[156] An amendment which would have provided for such a register was drafted. Memorandum to Senator Paul Wenke from Hubert D. Henry, Feb. 15, 1963. The amendment was proposed in the Senate Judiciary Committee, but as was stated, note 5 *supra*, the bill was never reported out of committee and the amendment never was printed in the Journal. The amendment would have added the provision for the register in H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-2(10) of § 1, at 5-6 (1963), substituting it for the printed subsection (10).

for setting aside agency action. Vast inconsistencies also exist in provisions for the adoption of rules, for the revocation of licenses, and for the taking of evidence in agency hearings.

The adoption of the revised Administrative Procedure Act which was first presented to the General Assembly in 1963 would remedy the major deficiencies of the present APA. By repeal of conflicting provisions in specific statutes, the revised act would eliminate areas of conflict and make the APA uniformly applicable to all state agencies. The revised act's major substantive change would create a central panel of hearing officers, who could be delegated to conduct hearings for any agency in accord with procedural requirements of the APA. Judicial review procedures would be more exactly defined in the revised version.

In addition to the changes proposed in 1963, a revised APA should incorporate a provision for a Colorado Regulations Register, which would publish all rules and notices required by the APA to be published.

To eliminate the confusion and uncertainty caused by the present diversity of regulations, the revised Administrative Procedure Act should be re-presented to the General Assembly at the earliest possible time, and should be enacted into law.